The opinion of the United States Bankruptcy Court of the District of Connecticut in *In re Willington Convalescent Home, Inc.* is reported at 39 B.R. 781 (Bankr. D. Conn. 1984) and appears in the Pet. App. at pages A98-A143. The opinion of said Court in *In re Edward Zera* is unreported and appears in the Pet. App. at pages A144-A168.

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 15, 1988. J.A.54A, Pet. App. A1. The petition for writ of certiorari was filed on September 7, 1988 and was granted on January 9, 1989. This Court has jurisdiction to review said judgment and opinion by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The full text of Article I, section 8, clauses 4 and 18, the Eleventh Amendment and sections 1 and 5 of the Fourteenth Amendment to the United States Constitution are set forth in the appendix hereto. Appendix to the Brief ("Br. App.") 1A.

STATUTORY PROVISIONS

The full text of the following statutory provisions is set forth in the appendix hereto:

11 U.S.C. § 101(26), Br. App. 1A-2A
11 U.S.C. § 106, Br. App. 2A
11 U.S.C. § 542, Br. App. 2A-3A
11 U.S.C. 547, Br. App. 3A-8A
11 U.S.C. § 550, Br. App. 8A-10A
28 U.S.C. § 157, Br. App. 10A-11A
28 U.S.C. § 1334, Br. App. 11A-13A

STATEMENT OF THE CASE

In re Willington Convalescent Home, Inc., Debtor No. 2-82-00508, and *In re Edward Zera*, 2-83-00754, are unrelated Chapter 7 cases presently pending in the United States Bankruptcy Court for the District of Connecticut (hereinafter "Bankruptcy Court"). The Petitioner herein, Martin W. Hoffman, Trustee, is the trustee in bankruptcy appointed in each of said Chapter 7 cases. J.A.4A.

Willington Convalescent Home, Inc., (hereinafter "Willington"), which operated a nursing home, filed its voluntary petition under Chapter 11 of the Bankruptcy Code (hereinafter "Code"), Title 11 of the U.S. Code, on June 2, 1982. J.A.4A. Prior to filing its Chapter 11 petition, Willington had contracted with the State of Connecticut to provide services to eligible patients under the Medicaid Program. J.A.6A. Under the contract Willington was reimbursed its costs of caring for eligible patients by the State of Connecticut at a per diem rate, determined from costs reports submitted by Willington. J.A.6A.

Willington operated its business as a debtor-in-possession during the pendency of its Chapter 11 case. On July 27, 1983, the Chapter 11 case was converted to a Chapter 7 case on Willington's motion and the Petitioner was appointed as trustee. J.A.4A.

In September, 1983, the Petitioner made demand on the State of Connecticut, Department of Income Maintenance (who, together with the State of Connecticut, Department of Health Services, are collectively referred to hereinafter as the "State"), for unpaid Medicaid cost reimbursements in the amount of $64,010.24. J.A.5A. These unpaid cost reimbursements were for services rendered by Willington to eligible Medicaid patients during the Chapter 11 case, in particular, during March, 1983. The State refused to pay the cost reimbursements, claiming the right to recoup alleged past Medicaid overpayments made to Willington prior to the commencement of the Chapter 11 case from the amounts due to Willington as debtor-in-possession for services performed during the Chapter 11 case. J.A.7A. Although the State claims that there is still outstanding the amount of $121,408.00 in alleged pre-petition overpayments, the State has not filed a proof of claim in the case. J.A.7A.

On January 3, 1984, the Petitioner commenced an adversary proceeding in the Bankruptcy Court to recover from the State the $64,010.25 in unpaid cost reimbursements as a debt due to the Estate, pursuant to 11 U.S.C. § 542(b). J.A.4A. On February 3, 1984, the State moved to dismiss the Petitioner's adversary proceeding on the grounds of sovereign immunity and that the State had the right to recoup pre-petition Medicaid overpayments under the aforesaid contract. J.A.6A. On April 25, 1984, the Bankruptcy Court denied the State's motion to dismiss. Pet. App. A98. On May 25, 1984, the State appealed the Bankruptcy Court's decision to the District Court. J.A.1A.

In *Zera*, the debtor, Edward Zera, did business as Alyear Maintenance Services. Prior to filing bankruptcy, he was indebted to the State of Connecticut, Department of Revenue Services, (hereinafter "Revenue Services"), in the amount of $1,977.00 for unpaid sales and use taxes, penalties and interest. On or about September 22, 1983, Revenue Services issued a tax warrant pursuant to Conn. Gen. Stat. § 12-35 for the total unpaid taxes, penalties, interest and fees. The tax warrant was served by an officer on Pioneer Systems as garnishee. On October 6, 1983, Pioneer Systems paid the $1,977.00 in total unpaid taxes, penalties and interest and the $123.62 service fee due the officer, for a total of $2,100.62.

On October 7, 1983, Zera fild a voluntary petition under Chapter 7 of the Code and the Petitioner was appointed as trustee. J.A.37A.

On January 4, 1984, the Petitioner commenced an adversary proceeding in the Bankruptcy Court against Revenue Services, to avoid the aforesaid garnishment pursuant to 11 U.S.C. § 547(b) as a preferential transfer and to recover the funds pursuant to 11 U.S.C. § 550(a). J.A.37A. On February 21, 1984, Revenue Services moved the Bankruptcy Court to dismiss the Petitioner's adversary proceeding on the grounds of sovereign immunity. J.A.39A. The Bankruptcy Court denied the motion in a Memorandum and Order dated June 8,

1984. Pet. App. A144. On June 15, 1984, Revenue Services appealed the Bankruptcy Court's decision to the District Court. J.A.34A.

Because the appeals in both *Willington Convalescent Home, Inc.* and *Edward Zera* raised a question concerning a state's Eleventh Amendment immunity, the District Court, on June 18, 1985, apprised the Attorney General of the United States of the constitutional question in both cases pursuant to 28 U.S.C. § 2403(b). J.A.2A, 35A. In both cases the United States moved to intervene, which motions were granted by the District Court, and, in both cases, the United States filed a brief. J.A.2A, 35A.

On May 8, 1987, the District Court entered a Judgment and issued a Memorandum of Decision in *Willington Convalescent Home, Inc.* and entered an Order and issued a Memorandum of Decision in *Edward Zera*. Pet. App. A20, A72. In both cases the District Court reversed the Bankruptcy Court and dismissed the Petitioner's adversary proceedings. J.A.19A, Pet. App. A96. On June 4, 1987, the Petitioner appealed the decisions of the District Court in both appeals to the United States Court of Appeals for the Second Circuit. (hereinafter "Court of Appeals"). J.A.2A, 35A. On June 15, 1988, the Court of Appeals decided both cases, affirming the decision of the District Court in each. J.A.54A.

A petition for writ of certiorari was filed on September 7, 1988. The petition was granted on January 9, 1989.

SUMMARY OF ARGUMENT

Section 106(c) of the Bankruptcy Code contains the clear expression of Congressional intent to waive State sovereign immunity to suit for money damages in federal court necessary for such a waiver to be valid. The terms of the statute make those provisions of the Bankruptcy Code containing "creditor", "entity" or "governmental unit" applicable to governmental units, including States, notwithstanding a claim

of sovereign immunity. The statute also states that a determination by the court of an issue arising under such a provision binds governmental units.

The relevant Bankruptcy Code provisions in these cases are sections 542(b), 547(b) and 550(a). Each of these sections contains one of the trigger words. Section 542(b) authorizes the trustee to recover a debt owed by an entity to the estate. Section 547(b) permits the trustee to avoid preferential prepetition transfers by the debtor to creditors. Section 550(a) permits the trustee to recover the value of a transfer avoided by the trustee from an entity to whom the transfer was made. It is clear from the language of section 106(c) that the provisions of sections 542(b), 547(b) and 550(a) are applicable to the States and that the States are bound by judgments entered by the court under these sections allowing the trustee to recover a debt owed to the estate or to avoid and recover a preference.

Congress also made clear their intent that the trustee be able to bring a suit under these Code sections in federal court. The District Courts are granted original jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11. See 28 U.S.C. § 1334(b) (1988). Under 28 U.S.C. § 157 these proceedings may be referred by the District Courts to the bankruptcy judges. See 28 U.S.C. § 157. The adversary proceedings in these case fall under this jurisdictional grant to the federal courts.

The legislative history of section 106(c) also makes clear that Congress intended to abrogate state sovereign immunity. Congress states therein that section 106(c) is included to comply with the requirement that an express waiver of sovereign immunity is required to be effective. 124 Cong. Rec. H. 11091 (Sept. 28, 1978) (remarks of Rep. Edwards). S.17407 (Oct. 7, 1978) (remarks of Sen. DeConcini) (reproduced in *Collier On Bankruptcy*, Appendix 3, Ch. IX at IX-90; Ch. X at X-16 (15th ed. 1979)).

Article I, section 8, clauses 4 and 18 of the Constitution of the United States empower Congress to abrogate, in section 106(c) of the Bankruptcy Code, State sovereign immunity to suit for money damages in the Bankruptcy Court. Congress' Article I, section 8 powers, like its power under section 5 of the Fourteenth Amendment, are carved out of the States' sovereign powers. In short, Article I, section 8 divests the States of their sovereignty with respect to the powers enumerated therein. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549, 105 S.Ct. 1005, 1017, 83 L.Ed.2d 1016 (1985). This Court has previously held that Congress, acting pursuant to the plenary power granted to it under section 5 of the Fourteenth Amendment, may abrogate the States sovereign immunity to suit for money damages in federal court. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976). Neither States sovereignty nor the Eleventh Amendment restrict this authority. The grant of plenary power to Congress under Article I, section 8 is similar to the grant of plenary power under section 5 of the Fourteenth Amendment. Both the Fourteenth Amendment and Article I, section 8 are limitations on State sovereignty and under both Congress is empowered to enact such legislation as is necessary and appropriate to give full effect to its power. Accordingly, when Congress acts pursuant to one of its Article I, section 8 powers, as it did when it enacted the Bankruptcy Code, it may abrogate the States' immunity to suit for a money judgment in the federal courts.

Congress must have this power to abrogate State sovereignty in order to carry out important bankruptcy law policy. The Bankruptcy Code is intended to create a single scheme for the fair, equitable and orderly distribution of the debtor's assets and to provide a debtor with a fresh start. Having a single federal scheme under the jurisdiction of the federal courts ensures uniformity and predictability in the application of the bankruptcy laws, which, in turn, helps assure that the Code's policies are carried out. In order for the Code to have its full effect all parties with an interest in the debtor's estate, including a State, must be subject to the federal court's

jurisdiction. Excluding the States from the bankruptcy court's jurisdiction would give the States the status of a super creditor. The States would have a strong incentive to collect whatever funds they believed due as rapidly as possible – even if this pushed the debtor into insolvency – rather than risk the possibility of recovering only a portion of their debt in any subsequent bankruptcy proceeding. See *Matter of McVey Trucking, Inc.*, 812 F.2d 311, 328 (7th Cir. 1987). The result of this would be an increase in bankruptcies and a distortion of Congress' carefully crafted system of priorities under the Code. *Id.*, 812 F.2d at 328. The policy of fair, equitable and orderly distribution of the debtor's assets would be undermined and uniformity and predictability in the system would cease to exist.

ARGUMENT

I. THE BANKRUPTCY CODE CONTAINS AN UNEQUIVOCAL WAIVER OF A STATE'S SOVEREIGN AND ELEVENTH AMENDMENT IMMUNITY TO SUIT FOR MONEY DAMAGES IN FEDERAL COURT.

A. Congressional Waiver Of A State's Sovereign Immunity To Suit For Money Damages Must Be Explicit And Clear.

The first issue to be addressed in this case is whether Congress, in enacting the Bankruptcy Code[1] (hereinafter "Code"), in particular sections 106, 542, 547 and 550 of the Code and 28 U.S.C. §§ 1334 and 157, intended to abrogate the States' sovereign immunity to suit for money damages in federal court.[2] A Congressional waiver of the States' sovereign immunity must be unequivocally expressed in the statute. See *Welch v. Texas Dept. of Highways & Public Transportation*, 107 S.Ct. 2941, 2946, 97 L.Ed.2d 389 (1987). *Atascadero State*

[1] Title 11 of the United States Code.

[2] The term "sovereign immunity" as used herein encompasses both the states' common law immunity to suit in general and their Eleventh Amendment immunity to suit in federal court.

Hospital v. Scanlon, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985). Congress must explicitly and by clear language indicate, on the face of the statute, an intent to sweep away the States' immunity. *Quern v. Jordan*, 440 U.S. 332, 345, 99 S.Ct. 1139, 1147, 59 L.Ed.2d 358 (1979). Also, the legislative history should focus directly on the question of state liability and show that Congress considered and firmly decided to abrogate the sovereign immunity of the States. *Id.*, 440 U.S. at 345, 99 S.Ct. at 1147.

An example of a statute that waives State sovereign immunity to suit for money damages in federal court is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (hereinafter "Title VII"). In *Fitzpatrick, supra*, this Court held that Title VII clearly contains the necessary congressional authorization to sue the States for money damages in federal court. *Id.*, 427 U.S. at 452, 96 S.Ct. at 2670. Title VII prohibits discriminatory employment practices and provides for both prospective injunctive relief and retrospective monetary relief in the form of back pay. *Id.*, 427 U.S. at 448, n. 1, 450, n. 5, 96 S.Ct. 2667, n. 1, 2668, n. 5. The 1972 Amendments to Title VII extended the scope of the statute to States and their employees by eliminating the express exclusion of States from the scope of the statute and by making clear that the right of an individual aggrieved by an employer's unlawful employment practices extended to persons aggrieved by public employers. *Id.*, 427 U.S. at 448-49, n. 2, 96 S.Ct. at 2668, n. 2. In comparison, those statutes which this Court has found do not abrogate the States' sovereign immunity do not explicitly provide for suits against the states. See, e.g. *Welch, supra; Atascadero State Hospital, supra, Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Welch concerned a suit under the Jones Act, 46 U.S.C. § 668, by a state employee against the State of Texas for damages for injuries she suffered in the course of her employment. *Id.*, 107 S.Ct. at 2944. The Jones Act, unlike Title VII, contains only a general authorization for suit in federal court. *Id.*, 107 S.Ct. at 2947. There is no specific authorization for

suits against States, therefore, the statute does not contain the necessary unmistakably clear statement that suit may be brought against a State in federal court. *Id.*, 107 S.Ct. at 2947. Similarly, in *Atascadero State Hospital* this Court held that the provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 794, granting remedies to qualified handicapped individuals for discrimination by "any recipient of Federal assistance" did not authorize suit by private individuals against the States in federal court. *Id.*, 473 U.S. at 245-46, 105 S.Ct. at 3149. The general language of the Rehabilitation Act was also not the kind of unequivocal statutory language sufficient to abrogate the States' sovereign immunity. *Id.*, 473 U.S. at 246, 105 S.Ct. at 3149. This statutory analysis led to a similar conclusion regarding Aid to the Aged, Blind or Disabled, funded in part by the federal government under the Social Security Act, 42 U.S.C. §§ 1381-1385, in *Edelman*, 415 U.S. at 650, 653, 94 S.Ct. at 1351.

Applying the analysis developed by this Court in the aforementioned cases to the Bankruptcy Code shows that the Code clearly expresses Congressional intent to waive the States' sovereign immunity to suit for money damages in federal court. The language and legislative history of sections 106, and the language of 542, 547 and 550 of the Code and 28 U.S.C. §§ 1334 and 157, make clear that a State may not raise sovereign immunity as a defense to an adversary proceeding by a trustee in bankruptcy under certain Code provisions in which the trustee seeks retrospective monetary relief against the State.

B. Section 106(c) Explicitly And By Clear Language Waives States Sovereign Immunity To Suit For Money Damages Under Certain Code Provisions.

Analysis of these statutory provisions begins with section 106 of the Code, which provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity –
>
> (1) a provision of this title that contains "creditor", "entity" or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. § 106 (1988).

The term "governmental unit", as defined in the Bankruptcy Code, includes a State as well as a department, agency or instrumentality of a State. See 11 U.S.C. § 101(26) (1989). Under subsections (a) and (b), a governmental unit is deemed to have waived its sovereign immunity with respect to compulsory and permissible counterclaims asserted by the trustee in those cases in which the governmental unit files a proof of claim. See *In re Willington Convalescent Home, Inc.*, 850 F.2d at 54 (2d Cir. 1988) (Pet. App. at A10-11); *Matter of McVey Trucking, Inc.*, 812 F.2d 311, 327 (7th Cir. 1987), *cert. denied sub nom, Edgar v. McVey Trucking Co.*, 108 S.Ct. 227, 98 L.Ed.2d 186 (1987). This waiver extends to proceedings for affirmative monetary recoveries on counterclaims and for monetary recoveries within the confines of a setoff. *Willington Convalescent Home, Inc.*, 850 F.2d at 54. Subsection (c), on the other hand, applies when a governmental unit does not file a proof of claim in the case. In this situation a governmental unit's sovereign immunity is waived with respect to actions brought under those Code sections containing one of

the trigger words "creditor", "entity" or "governmental unit". See *Willington*, 850 F.2d at 54 (Pet. App. at A12); *McVey*, 812 F.2d at 326, 327. Since section 106(c) applies "notwithstanding any assertion of sovereign immunity", 11 U.S.C. § 106(c), the waiver of sovereign immunity thereunder pertains regardless of whether the action brought against the State seeks prospective injunctive relief or retrospective monetary relief. The Second Circuit erred in disregarding the plain language of section 106(c) and holding that the waiver under section 106(c) does not extend to actions for money damages. The statute clearly and unequivocally prohibits a State from asserting sovereign immunity as a defense to an action brought under one of the Code sections containing one of the trigger words.

The extend of the waiver under section 106(c) is determined by the terms of the specific Code provisions containing one of the trigger terms. These Code provisions delineate the issues, the determination of which binds the States. With respect to the instant cases these other Code sections are sections 542(b), 547(b) and 550(a). In *In re Willington Convalescent Home, Inc.*, debtor no. 2-82-00508, the Petitioner sued the Respondents, State of Connecticut Department of Health Services and Department of Income Maintenance pursuant to section 542(b) to recover a debt owed to the estate for services performed by the debtor during its Chapter 11 case under its Medicaid contract with the Respondents. Section 542(b) provides that:

> (b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

11 U.S.C. § 542(b) (1988).

The statute contains the trigger term "entity", so its provisions apply to the States. Pursuant to section 106(c)(2) a

State would be bound, under the terms of section 542(b), by a determination of the bankruptcy court that the State is liable to the trustee for a money debt owed to the estate and that the debt must be paid to the trustee for the benefit of the estate. Therefore, under section 542(b), the Petitioner may recover a money judgment against the State of Connecticut for a debt owed by the State of Connecticut to the estate.

In *In re Edward Zera*, debtor no. 2-83-00754, the Petitioner brought suit against the Respondent, State of Connecticut Department of Revenue Services, to recover pursuant to section 547(b) of the Code, a preferential payment made to the State by the debtor. The day before the debtor filed his petition in bankruptcy the Respondent obtained $2,100.62 in payment of the debtor's outstanding sales and use taxes owed to the Respondent. Section 547(b) permits the trustee to avoid certain pre-petition transfers of property by the debtor to creditors. See *McVey*, 812 F.2d at 326; 11 U.S.C. § 547(b) (1988). In addition, section 550(a) of the Code provides:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a) (1988). This section permits a trustee to recover the value of an avoided preferential transfer from the entity for whose benefit the transfer was made. In *Zera*, the preferential transfer was made to, and for the benefit of, the State of Connecticut. Therefore, the Petitioner may recover a money judgment against the State of Connecticut to the extent that he avoids, under section 547, the preferential transfer made to the State.

These sections of the Bankruptcy Code contain the necessary explicit language permitting the Trustee to recover a money judgment against a State. Under section 542(b) a trustee may collect money owed to the estate and under section 550 he may recover the value of an avoided preferential transfer.

The Second Circuit erred in interpreting section 106(c) by not taking into account the provisions of sections 542(b), 547(b) and 550(a) to which section 106(c) refers. When interpreting the Bankruptcy Code, a particular section should not be read in isolation, instead, it should be read in light of its relationship to the entire Code. See *Kelly v. Robinson*, 107 S.Ct. 353, 358, 93 L.Ed.2d 216 (1986); *McVey Trucking, Inc.*, 812 F.2d at 326. Because the Court of Appeals did not read section 106(c) in light of the other Code sections to which it refers, its interpretation of the waiver of sovereign immunity of section 106(c) is too narrow. In light of the language of sections 542(b), 547(b) and 550(a), section 106(c) explicitly waives the States' sovereign immunity to suits for money damages.

That Congress also intended to abrogate the States' Eleventh Amendment immunity to suit in federal court by a trustee under sections 542(b) and 547(b) is made clear by the language of 28 U.S.C. §§ 1334(b) and 157. Section 1334(b) of Title 28 confers on the district courts original, but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to a case under title 11. See 28 U.S.C. § 1334(b) (1988). Section 157(a) permits the district court to refer to the bankruptcy court any or all proceedings arising under title 11 or arising in or related to a case under title 11. See 28 U.S.C. § 157(a) (1988). Section 157(b)(1) permits bankruptcy judges to hear and determine all core proceedings arising under title 11 or arising in a case under title 11 referred under section 157(a). See 28 U.S.C. § 157(b)(1) (1988). Among the enumerated core proceedings are proceedings to determine, avoid or recover preferences. See 28 U.S.C. § 157(b)(2) (1988). Also, a bankruptcy judge may hear and determine non-core proceedings related to a case under title 11 with the consent

of the parties to the proceeding.[3] See 28 U.S.C. § 157(c). Therefore, Congress provided for both a cause of action for money damages against an unconsenting State and a federal forum in which such cause of action may be enforced.

C. The Legislative History Of Section 106(c) Demonstrates Congress' Intent To Abrogate State Sovereign Immunity To Suits For Money Damages Under The Bankruptcy Code.

The legislative history of section 106(c) also shows that Congress intended to abrogate State sovereign immunity to suits under the Code for money damages. Subsection (c) was not contained in either of the original House or Senate versions of section 106. The Conference Committee amended the section, adding subsection (c). The purpose of the new subsection was explained by the Conference Committee as follows:

> Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor", "entity", or "governmental unit" in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. Section 106(c) codifies In re Gwilliam, 519 F.2d 407 (9th Cir. 1975), and In re Dolard, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in sections 106(a) and (b), subsection (c) is not limited to those issues, but

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[3] In *In re Willington Convalescent Home, Inc.*, the parties to the adversary proceeding have consented to the bankruptcy court hearing and determining said adversary proceeding. See Consent to Entry of Judgment or Dispositive Order by a United States Bankruptcy Judge dated April 5, 1984 and April 10, 1984. J.A., 11A.

permits the bankruptcy court to bind governmental units on other matters as well. For example section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby overruled.

124 Cong. Rec. H. 11091 (Sept. 28, 1978) (remarks of Rep. Edwards). S. 17407 (Oct. 7, 1978) (remarks of Sen. DeConcini) reproduced in *Collier on Bankruptcy,* Appendix 3, Ch. IX at IX-90; Ch. X at X-16 (15th ed. 1979).

The Conference Committee's statement shows that under section 106(c) Congress clearly intended to waive a State's sovereign immunity with respect to claims arising under certain Code sections, including sections 542(b) and 547(b), whether or not the State filed a proof of claim in the case. Both the Committee statement and the statute state that section 106(c) applies to governmental units; a broadly defined term that includes States as well as the federal government. They also show that Congress carefully chose the Code sections to which section 106(c)'s waiver of sovereign immunity would apply, and that these sections include more than those concerning tax liability and preferential transfers.

The Court of Appeals in this case erred in finding that the legislative history of section 106(c) showed that the primary purpose behind the section was to codify the results in *In re Gwilliam* and *In re Dolard* that the bankruptcy court has jurisdiction to hear and determine the amount and dischargeability of tax liabilities of the debtor or the estate. See *Willington,* 850 F.2d at 56 (Pet. App. at A15). Codifying the results of these two cases is one of the purposes of section 106(c), however, it is clear from the legislative history that the primary purpose of section 106(c) is "to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective" 124 Cong. Rec. H. 11091 (Sept. 28, 1978) (remarks of Rep. Edwards). S. 17407 (Oct. 7, 1978) (remarks of Sen. DeConcini) (reproduced in *Collier On Bankruptcy,* Appendix 3, Ch. IX at IX-90; Ch. X at

X-16 (15th ed. 1979)). This shows that Congress was aware of this Court's holdings regarding waiver of State sovereign immunity and that it intended on meeting the requirements necessary for such a waiver to be effective.

Congress, in enacting section 106(c) of the Bankruptcy Code explicitly stated, in the clear language of the statute, an intent to abrogate the States' sovereign immunity to suit for money damages in the federal courts. Also, the legislative history of section 106(c) shows that Congress focused on the issue of State liability in enacting section 106(c) and considered and firmly decided to abrogate the States' sovereign immunity. Since Congress has met the requirements necessary to waive State sovereign immunity, see *Quern,* 440 U.S. at 345, 99 S.Ct. at 1147, this Court should hold that the bankruptcy court has jurisdiction in these cases over the Petitioner's adversary proceedings against the Respondents.

II. CONGRESS, ACTING PURSUANT TO ITS PLENARY POWERS UNDER ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES MAY ABROGATE THE STATES' SOVEREIGN IMMUNITY TO SUIT IN FEDERAL COURT, NOTWITHSTANDING THE ELEVENTH AMENDMENT.

Congress enacted section 106(c) of the Bankruptcy Code pursuant to the authority granted to it under Article I, section 8, clauses 4 and 18 of the Constitution of the United States. See *Katchen v. Landy,* 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966). These sections of Article I provide, respectively, that "Congress shall have Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States", and that "Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." *U.S. Const.,* art. I, § 8, cls. 4, 18. Since Congress, in enacting section 106(c) of the Bankruptcy Code, clearly intended to abrogate State sovereign immunity to suit in the federal courts, whether Congress has the authority under Article I of the Constitution to abrogate State sovereign immunity is an issue in these cases.

The Court of Appeals for the Second Circuit did not reach this issue in these cases, having erroneously decided that section 106(c) did not express an unmistakably clear intent on the part of Congress to abrogate State sovereign immunity. *Willington Convalescent Home, Inc.*, 850 F.2d at 56, (Pet. App. at A17). In *McVey Trucking, Inc.*, the Court of Appeals for the Seventh Circuit did reach this issue and determined that Congress may abrogate State immunity to suit pursuant to any of its plenary powers. *McVey Trucking, Inc.*, 812 F.2d at 323. To date this Court has not decided this issue.[4] On two occasions this Court has "assumed, without deciding" that Congress possesses the authority under Article I of the Constitution to subject States to suit in federal court. See *Welch*, 107 S.Ct. at 2946. (Congressional authority under the Commerce Clause); *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 252, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985) (concerning Congress' power to regulate commerce with Indian tribes).

A. State Sovereignty Does Not Limit Congress' Power To Abrogate State Sovereign Immunity To Suit For Money Damages In Federal Court Under Article I, Section 8, Clause 4 Of The Constitution.

There are two possible limitations on Congress' authority to abrogate State sovereign immunity; the sovereignty of the States as states or the provisions of the Eleventh Amendment. See *McVey Trucking, Inc.*, 812 F.2d at 315. With respect to the first possible limitation, it is well settled that the powers granted to Congress in the Constitution are granted exclusively to Congress. The sovereignty of the States is limited by the Constitution itself. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548, 105 S.Ct. 1005, 1016, 83 L.Ed.2d 1016 (1985). Article I, section 8 of the Constitution divests the States of their sovereign authority with respect to powers enumerated therein and transfers this authority to Congress. *Id.*, 469 U.S. at 549, 105 S.Ct. at 1017. In *Garcia* this analysis led this Court to hold that State sovereignty did not bar Congress from subjecting the San Antonio Metropolitan Transit Authority to the minimum wage and overtime pay provisions of the Fair Labor Standards Act ("FLSA"). *Id.*, 469 U.S. at 554, 105 S.Ct. at 1019. Congress enacted the FLSA pursuant to its plenary power under the Commerce Clause of Article I, section 8. *Id.*, 469 U.S. at 530, 105 S.Ct. at 1006-07. Thus, Congress, acting pursuant to its Commerce Clause power, has authority to subject unconsenting States to direct monetary obligations to private individuals, notwithstanding State sovereignty.

In *Fitzpatrick, supra*, this Court held that Congress, acting pursuant to section 5 of the Fourteenth Amendment, may provide for private suits against States which are constitutionally impermissible in other contexts. *Fitzpatrick*, 427 U.S. at 456, 96 S.Ct. at 2671. This Court stated that State sovereignty is necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment. *Id.*, 427 U.S. at 456, 96 S.Ct. at 2671. Section 5 grants Congress the authority to enforce the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on State authority. *Id.*, 427 U.S. at 4667, 96 S.Ct. at 2671.

Although *Fitzpatrick* and *Garcia* involve different situations and issues, this Court's conclusions regarding the effect of State sovereignty on Congressional power are similar and are derived from similar reasoning. In both cases Congress acted to create a monetary obligation on the States; in *Fitzpatrick* it was liability for money damages in the form of back pay and in *Garcia* it was a direct obligation to pay overtime wages to state employees. In both cases Congress acted pursuant to its constitutional plenary powers; plenary powers which were carved out from the States' sovereign powers and given to Congress. This same reasoning is applicable to this case. The Bankruptcy Clause of Article I, section 8, clause 4

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[4] There is presently pending before this Court the case of *Pennsylvania v. Union Gas Co.*, docket no. 87-1241 (argued October 31, 1988) in which this issue, as it pertains to Congress' power under the Commerce Clause, is raised. To date no decision in said case has been issued by this Court.

grants Congress the exclusive authority to make laws regarding bankruptcy. This grant of plenary power extends, as it does under the Commerce Clause and section 5 of the Fourteenth Amendment, to providing for suits against the States for money judgments enforceable in the federal courts. State sovereignty is no limitation on this authority just as it is no limitation on Congressional authority under the Commerce Clause or section 5 of the Fourteenth Amendment.

B. The Eleventh Amendment Does Not Limit Congress' Power To Abrogate State Sovereign Immunity To Suit For Money Damages In Federal Court Under Article I, Section 8, Clause 4 Of The Constitution.

The Eleventh Amendment also does not limit Congressional authority to abrogate State sovereign immunity to suits for money damages in the federal courts. The Amendment provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend XI.

This Court has not yet decided what effect this Amendment has on Congress' Article I powers, although, in *Fitzpatrick* this Court held that the Eleventh Amendment did not bar Congress from abrogating State immunity to suit for money damages in federal court pursuant to section 5 of the Fourteenth Amendment. See *Fitzpatrick*, 427 U.S. at 458, 96 S.Ct. at 2671. The Court of Appeals for the Seventh Circuit, in *McVey Trucking, Inc.*, and the Court of Appeals for the Third Circuit, in *U.S. v. Union Gas Co.*, 832 F.2d 1343 (3rd Cir. 1987), *cert. granted sub nom. Pennsylvania v. Union Gas Co*, no. 87-1241 (1988) (see footnote 4, supra,) have both recently held that the Eleventh Amendment does not limit Congress' Article I powers.

The Eleventh Amendment was enacted to overrule the decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 97, 104 S.Ct. 900, 906, 79 L.Ed.2d 67 (1984). As such, the Amendment was intended to limit the power of the federal judiciary to construe its Article III jurisdiction. The language of the Amendment, however, does not limit the power of Congress to abrogate State sovereign immunity. *Union Gas II*, 832 F.2d at 1353, *McVey Trucking, Inc.*, 812 F.2d at 317, Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 693-99 (1976). In *Fitzpatrick* this Court examined the relationship between the Eleventh Amendment and the enforcement power granted to Congress under section 5 of the Fourteenth Amendment. *Fitzpatrick*, 427 U.S. at 456, 96 S.Ct. at 2671. This Court's analysis focused on the relationship between the States and the federal government embodied in the Fourteenth Amendment. *Id.* 427 U.S. at 453-55, 96 S.Ct. at 2670-71. The Fourteenth Amendment places restrictions on State power. In so doing, it carves out a portion of the State's sovereign power and grants it to the federal government. *Id.*, 427 U.S. at 454-55, 96 S.Ct. at 2670-71. Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive restrictions on the States through appropriate legislation. *Id.*, 427 U.S. at 456, 96 S.Ct. at 2671. Consequently, Congress, in order to give full effect to this grant of plenary power, has the authority to abrogate the State's sovereign immunity to suit for money damages in federal court. *Id.*, 427 U.S. at 456, 96 S.Ct. at 2671.

The relationship between the States and the federal government embodied in Article I, section 8 of the Constitution is similar to the relationship between them under the Fourteenth Amendment. Article I, section 8, like the Fourteenth Amendment, carves out a portion of the States' sovereign powers and grants these powers exclusively to Congress. *Garcia*, 469 U.S. at 459, 105 S.Ct. at 1017. Article I, section 8 also gives Congress the power to enforce its substantive

powers thereunder through necessary and proper legislation. See *U.S. Const.*, art. I, § 8, cl. 18. Therefore, Congress, acting pursuant to its Article I, section 8 plenary power may abrogate the States' Eleventh Amendment immunity. The Eleventh Amendment immunity of the States must necessarily be limited by Congress' Article I, section 8 powers in order to give full effect to Congress' powers.

The fact that the Eleventh amendment was ratified after Article I and prior to the ratification of the Fourteenth Amendment does not diminish Congress' powers under Article I. See *Union Gas II*, 832 F.2d at 1351-52; *McVey Trucking, Inc.*, 812 F.2d at 316-17. This Court recognizes that the Constitution and its Amendments must be regarded as one instrument, all of whose provisions are to be deemed of equal validity and interpreted as a whole. See *Prout v. Starr*, 188 U.S. 537, 543, 23 S.Ct. 398, 400, 47 L.Ed. 584 (1903), quoted in *Union Gas II*, 832 F.2d at 1351. The Eleventh Amendment does not contain a limitation on Congressional power, nor was it so intended. See *Union Gas II*, 832 F.2d at 1352, *McVey Trucking, Inc.*, 812 F.2d at 317. There is also nothing in the Fourteenth Amendment to suggest that it repeals in any way the Eleventh Amendment. See *Union Gas II*, 832 F.2d at 1352, *McVey Trucking, Inc.*, 812 F.2d at 317. Therefore, a chronological interpretation of Congressional constitutional authority is not warranted. See *Union Gas II*, 832 F.2d at 1352, *McVey Trucking, Inc.*, 812 F.2d at 317.

The Eleventh Amendment, therefore, does not bar the federal courts from exercising jurisdiction over questions of federal law when Congress has granted them the authority to do so. See *Welch*, 107 S.Ct. at 2946; *Atascadero State Hospital*, 473 U.S. at 233, 105 S.Ct. at 3147; *Fitzpatrick*, 427 U.S. at 456, 96 S.Ct. at 2671. Cases such as *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) and *Pennhurst, supra*, are distinguishable from the instant cases since these former cases did not involve a Congressional grant of federal question jurisdiction. In *Hans* the plaintiff asserted a common law claim for payment of interest on bonds issued by the

State of Louisiana. *Hans*, 134 U.S. at 1, 10 S.Ct. at 504. He claimed that the State violated the Contracts Clause of the Constitution by not paying interest on said bonds. *Id.*, 134 U.S. at 7-8, 10 S.Ct. at 504-05. The Court did not consider the question of whether Congress could expressly displace State sovereign immunity pursuant to its plenary powers. See *McVey Trucking, Inc.*, 812 F.2d at 318. In *Pennhurst* this Court held that the Eleventh Amendment bars suit by an individual in federal court against an unconsenting State based on a state law claim. *Pennhurst*, 465 U.S. at 117, 104 S.Ct. at 917. In the instant cases a federal statute, the Bankruptcy Code, gives the Petitioner his causes of action against the Respondent State of Connecticut. Since Congress enacted the Bankruptcy Code pursuant to its Article I, section 8, clause 4 powers, Congress may provide in the Bankruptcy Code for a cause of action for money damages against a State enforceable in federal court.

III. CONGRESS MUST BE ABLE TO ABROGATE STATE SOVEREIGN IMMUNITY TO SUIT FOR MONEY DAMAGES IN THE FEDERAL COURTS IN ORDER TO GIVE EFFECT TO IMPORTANT BANKRUPTCY POLICY.

A. The Abrogation Of State Sovereign Immunity To Suits For Money Damages In Federal Court Embodied In Section 106(c) Of The Bankruptcy Code Promotes Bankruptcy Law Policy.

Congressional policy has long been to vest exclusive jurisdiction over bankruptcy cases in the federal courts. See *McVey Trucking, Inc.*, 812 F.2d at 321, n.5. The Bankruptcy Code continues this policy by providing a single scheme for the administration of debtor's estates through the bankruptcy courts. See *Matter of American Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988); *In re Chase & Sanborn Corp.*, 835 F.2d 1341 (11th Cir. 1988). A single scheme for the administration of debtors' estates, in turn, ensures that the bankruptcy law policies of fair, equitable and orderly distribution of the debtor's assets and to provide a fresh start to the debtor are carried out. Such

a scheme also ensures uniformity and predictability in the application of the bankruptcy laws. To give full effect to these policies, it is necessary that all the parties with an interest in a case, that is, the debtor as well as those who did business with him, be subject to the jurisdiction of the bankruptcy court. Congress recognized this necessity when it enacted section 106 of the Code, subjecting the States to the provisions of the Bankruptcy Code.

The effect of the waiver of sovereign immunity contained in section 106(c) of the Code is to subject the States to certain Code provisions, even though a State does not file a proof of claim in a case. The statute does not subject them to all the provisions of the Code, however. It subjects them only to those provisions containing one of the trigger words, "creditor," "entity" or "governmental unit". See 11 U.S.C. § 106(c) (West 1988). Not all of the Code's provisions contain one of the trigger words; sections 545 (statutory liens) and section 549 (post-petition transfers) do not contain one of the trigger words. Those sections that do contain a trigger word generally concern estate administration or the trustee's avoidance powers. Subjecting the States to these sections of the Code fosters the orderly administration of the estate and the fair and equitable distribution of the debtor's assets. Permitting the trustee to recover estate property in the possession of a State, to recover a debt owed to the estate by a State or recovering a preference from a State ensures that the interests of all creditors are protected by maximizing the estate available for distribution.

Subjecting the States to the Bankruptcy Code is also necessary because of the States' prominent role in the economy. The States interact with businesses as taxing authorities, regulators and as both providers and consumers of goods and services. If the States were not subject to the provisions of the Bankruptcy Code they would be in a position superior to that of all other creditors. The negative effect of such a situation on the bankruptcy system was described by the Court of Appeals for the Seventh Circuit in *McVey Trucking, Inc.*:

> If the federal courts were not able to order a state to turn over assets to a bankruptcy estate, then any state owed money by a debtor having financial problems would have a strong incentive to collect whatever funds it believed to be due as rapidly as possible – even if this pushed the debtor into insolvency – rather than risking the possibility of recovering only a portion of their debt in any subsequent bankruptcy proceedings. In effect, we would be holding that the Constitution makes a state a preferred creditor in every bankruptcy. The very existence of this power would doubtless encourage other creditors to accelerate their collections. The end result would be an increase in bankruptcies and a distortion of the system of preferences that Congress has carefully crafted. We seriously doubt that either the Eleventh Amendment or the doctrine of sovereign immunity demands such a fundamental disruption of the bankruptcy system.

Id. at 328.

Furthermore, a single federal forum for the adjudication of bankruptcy proceedings promotes uniformity and predictability in the administration of debtors' estates. It also fosters the prompt and efficient administration of debtors' estates. The Bankruptcy Code should be applied in the same manner everywhere. If the States were not subject to suit under the Bankruptcy Code in the bankruptcy court the trustee would have to look to the state courts. The undesirable result of such a situation would be the state courts interpreting and enforcing federal law. Uniformity and predictability would disappear from the system and the time and cost required to administer an estate would be increased.

B. Abrogation Of State Sovereign Immunity To Suit For Money Damages Under The Bankruptcy Code Is In Keeping With The Constitutional Plan.

The power of Congress to abrogate State sovereign immunity is not only necessary to promote bankruptcy policy it

is also in keeping with the constitutional plan. See Tribe, *supra*, 89 Harv. L. Rev. at 694 (1976). Article I envisions that Congress will have exclusive power to regulate certain subjects when, in the clearly expressed opinion of Congress, such regulation would serve the nation's interests. *Id.*, at 694. One such subject is bankruptcy. In enacting the Bankruptcy Code Congress exercised its exclusive right to regulate the administration of debtors' estates. To the extent that sovereign immunity would free a State from such national controls, that immunity is inconsistent with the constitutional plan. *Id.*, at 694-95. Also, the interests of the States as sovereigns are protected by their representation in Congress. See *Principality of Monaco v. Missouri*, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934); *Union Gas II*, 832 F.2d at 1355. It is clear from the wording of the language and legislative history of section 106 of the Bankruptcy Code that Congress carefully considered State sovereignty when it enacted that section. By limiting the number of sections of the Code to which a State is subject if it has not filed a proof of claim, Congress has balanced the States' interests as sovereigns with the nation's interests in an efficient, uniform bankruptcy system.

CONCLUSION

For the foregoing reasons the Judgment of the Court of Appeals for the Second Circuit should be reversed and these proceedings should be remanded to the United States Bankruptcy Court for the District of Connecticut for trial.

Respectfully Submitted,

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Martin W. Hoffman
410 Asylum Street
Hartford, CT 06103
Tel: (203) 525-4287
Counsel for Petitioner
Counsel of Record

Douglas J. McDade
410 Asylum Street
Hartford, CT 06103
Tel: (203) 525-4287

No. 88-412

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

MARTIN W. HOFFMAN, TRUSTEE
Petitioner

v.

CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE, ET AL.
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

CONSTITUTIONAL PROVISIONS

Article I, Section 8

The Congress shall have the Power . . .

clause 4: To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

clause 18: To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Eleventh Amendment to the United States Constitution

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Sections 1 and 5 of the Fourteenth Amendment to the United States Constitution

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS

11 U.S.C. § 101(26).

(26) "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state;

department, agency or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

11 USCS § 106.

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such govermental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity –

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

11 USCS § 542.

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, acountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

11 U.S.C. § 547.

(a) In this section –

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a con-

tract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such a transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer –

(1) to the extent that such transfer was –

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor –

(A) to the extent such security interest secures new value that was –

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of –

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of statutory lien that is not avoidable under section 545 of this title.; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

(d) the trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section –

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made –

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

11 USCS § 550.

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from –

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of –

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes –

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(e) An action or proceeding under this section may not be commenced after the earlier of –

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

28 USCS § 1334.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 (11 USCS §§ 101 et seq.].

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to cases under title 11 [11 USCS §§ 101 et seq.].

(c)(1) Nothing in this section prevents a district court in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 [11 USCS §§ 101 et seq.] or arising in or related to a case under title 11 [11 USCS §§ 101 et seq.].

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 [11 USCS §§ 101 et seq.] but not arising under title 11 [11 USCS §§ 101 et seq.] or arising in a case under title 11 [11 USCS §§ 101 et seq.], with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code [11 USCS § 362], as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 [11 USCS §§ 101 et seq.] is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the property of the estate.

28 USCS § 157.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

RESPONDENT'S

BRIEF

No. 88-412 (1)

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

IN RE WILLINGTON CONVALESCENT HOME, INC., DEBTOR
MARTIN W. HOFFMAN, TRUSTEE
Petitioner

v.

STATE OF CONNECTICUT, DEPARTMENT OF INCOME MAINTENANCE, STATE OF CONNECTICUT, DEPARTMENT OF HEALTH SERVICES and UNITED STATES OF AMERICA
Respondents

IN RE EDWARD ZERA, DEBTOR
MARTIN W. HOFFMAN, TRUSTEE
Petitioner

v.

STATE OF CONNECTICUT, DEPARTMENT OF REVENUE SERVICES and UNITED STATES OF AMERICA
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATE OF CONNECTICUT RESPONDENTS

CLARINE NARDI RIDDLE
DEPUTY ATTORNEY GENERAL
(ACTING ATTORNEY GENERAL)
KENNETH A. GRAHAM
Assistant Attorney General
JOAN E. PILVER
Assistant Attorney General

CARL J. SCHUMAN*
Assistant Attorney General
55 Elm Street
Hartford, Connecticut 06106
Telephone (203) 566-4990
*Counsel of Record for State Respondents

38 pp

QUESTIONS PRESENTED

1. Whether Congress in 11 U.S.C. § 106(c) intended to abrogate the States' Eleventh Amendment immunity from bankruptcy actions seeking money damages?

2. Whether Congress has the constitutional authority under the Bankruptcy Clause to abrogate the States' Eleventh Amendment immunity from bankruptcy actions seeking money damages?

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STATEMENT OF THE CASE

These two unrelated bankruptcy adversary proceedings, decided jointly by the court of appeals, raise the question of whether Congress intended to and, in view of the Eleventh Amendment, has the power under the Bankruptcy Clause to authorize suits in bankruptcy court for money damages against the States.

1. *In re Willington Convalescent Home, Inc.* involves a nursing home facility that participated in the Connecticut Medicaid Program. See App. to Pet. at A28-A33. Willington agreed to provide nursing care services to indigent patients eligible under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, at a specific per diem rate of compensation. The State determined the per diem rate from annual cost reports submitted by Willington.

Under the program the State initially accepts at face value the cost data submitted by nursing homes such as Willington, but then conducts subsequent field audits to verify that the costs claimed are legitimate. If costs are found to have been improperly or falsely claimed, the State is obligated to adjust the per diem rate retroactive to the applicable rate year and recoup the amount of Medicaid overpayment from whatever monthly payments may be due and owing to the facility for current patient care. Unless or until the field audit has taken place, there is no final determination that the monthly Medicaid payments belong to the nursing home at all. If the nursing home disputes the findings made in the field audit, it may seek an administrative hearing within the Connecticut Department of Income Maintenance, and then seek judicial review by appeal to the Connecticut Superior Court.

In this case Willington submitted sworn cost reports for the years 1976 to 1980 that claimed real property costs of $294,007.00. On the basis of these reports, the State set per diem Medicaid rates for those years. A subsequent field audit

disclosed, however, that Willington's actual costs were only $22,500.00. As a result of its inaccurate reports, Willington had received substantial Medicaid overpayments for these five rate years. Accordingly, the Commissioner of the Connecticut Department of Income Maintenance issued two Medicaid rate decisions in 1982 adjusting downward Willington's per diem rates for the years 1976 and 1980, and 1977 through 1979, respectively. The effect of these decisions was to commence the recoupment of the substantial Medicaid overpayments Willington had received.

Willington did not contest the recomputation of its rates for 1976 and 1980, but did request administrative review of the 1977 through 1979 decision. Soon thereafter, however, Willington moved to postpone the administrative hearing indefinitely. Meanwhile, in June, 1982, shortly after recoupment of the past Medicaid overpayments had commenced, Willington filed a Chapter 11 petition in bankruptcy.[1]

While in bankruptcy Willington continued to participate in the Medicaid program and to receive monthly checks. The State sought to and did recoup a modest amount of the past Medicaid overpayment from the monthly payments due Willington for ongoing patient care. In April, 1983, Willington shut down permanently, still owing the State $121, 408.00.

In July, 1983, the bankruptcy court converted the case from Chapter 11 to Chapter 7 and appointed the petitioner as trustee. The trustee then filed the present adversary complaint against the State seeking payments owed to Willington for March, 1983. The State refrained during these proceedings

[1] This result is not uncommon. The pattern in the Connecticut nursing home industry, and the actual practice in this case, is for the owners of the nursing home entity to form a partnership to own assets such as land, buildings, and furnishings, and to form a corporation to constitute the nursing home entity. In that way the corporation can file for bankruptcy to discharge its debts, while the owners can remain out of bankruptcy and retain the assets.

from filing a proof of claim so as to avoid doing anything that could be construed as a waiver of its Eleventh Amendment immunity.

2. In *Zera* a Connecticut business operated by Edward Zera and known as Alyear Maintenance Service owed the State Department of Revenue Services sales and use taxes, and associated penalties and interest. *See* App. to Pet. at A73-A75. In September, 1983, the Revenue Department issued a tax warrant. An officer served the warrant on Pioneer Systems as garnishee. Pioneer made a payment of $2,100.62 to the State to satisfy the warrant.

Zera filed for Chapter 7 bankruptcy relief on October 7, 1983 and the bankruptcy court appointed the petitioner as trustee. The trustee filed an adversary complaint against the Department seeking to avoid the $2,100.62 payment as a preference under 11 U.S.C. § 547(b) and to recover monies transferred pursuant to 11 U.S.C. § 550(a). Although the Connecticut Department of Labor filed an unrelated proof of claim against Zera for unemployment compensation taxes, the Department of Revenue Services filed no proof of claim.

3. In both cases, the State agencies (hereinafter the State unless otherwise indicated) moved to dismiss the petitions on sovereign immunity and other grounds in the bankruptcy court. J.A. 6A-9A, 39A. The bankruptcy court denied both motions, holding that Congress had intended 11 U.S.C. § 106(c) to abrogate the State's Eleventh Amendment immunity from suit and that the Article I, § 8 Bankruptcy Clause empowered Congress to do so. App. to Pet. A98-A168.

The State appealed both decisions to the United States District Court for the District of Connecticut. On invitation of the district court, the United States intervened to present argument on the meaning and constitutionality of § 106. App. to Pet. at A36-A37. In both cases, the district court held that Congress did not intend § 106(c) to subject the States to suits for money damages in bankruptcy court. The court thus did

not reach the constitutional question. App. to Pet. at A20–A97. In *Willington* the court nonetheless added the following:

> However, should the Court of Appeals for the Second Circuit or the United States Supreme Court conclude that the bankruptcy court did properly assert jurisdiction over the trustee's claim, it is found — for essentially the reasons given in the Brief and Reply Brief of the Appellants — that the terms of Willington's contract with Connecticut entitled the state to recoup past overpayments to Willington by withholding the funds due for services provided in March, 1983.

App. to Pet. at A70–A71. *See also* J.A. at 20A–33A.

The trustee appealed both cases to the United States Court of Appeals for the Second Circuit, raising the § 106(c) question, the constitutional question, and, in *Willington*, the recoupment question. J.A. at 40A–43A. *See also* J.A. at 44A–53A. The Second Circuit affirmed on the ground that § 106(c) authorized bankruptcy courts only to make declaratory or injunctive determinations against governments and not to entertain actions for money damages against governments. The court focused on the language of § 106(c)(2), which provides that "*a determination* by the court of an *issue* arising under such a provision [that contains the words "creditor," "entity" on "governmental unit"] *binds* governmental units." (Emphasis added.) The court accordingly did not reach the constitutional question or the recoupment question in *Willington*.[2]

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[2] The court did reject the State's argument that the action in *Willington* was not a § 542(b) turnover proceeding and thus one that did not arise under a provision containing the word "creditor," "entity," or "governmental unit" so as to fall within § 106. While the court noted in passing that the State, because of its recoupment claim, denied owing a debt to the trustee, the court did not resolve or otherwise address the recoupment

(continued)

The trustee petitioned for certiorari on the § 106(c) and constitutional questions.[3] Presumably because of a conflict among the courts on these issues, *see* Brief for the United States (on the petition for a writ of certiorari) at 8–11, this Court granted certiorari.

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[2] *(continued)*
issue. App. to Pet. at A6. The State no longer pursues the argument that the complaint does not state a claim under § 542(b), but continues to maintain, as a defense to the § 542(b) claim, that it can recoup the entire amount of funds due Willington for services provided in March, 1983. *See In re B&L Oil Co.*, 782 F.2d 155 (10th Cir. 1986); *Lee v. Schweiker*, 739 F.2d 870, 874–76 (3rd Cir. 1984).

[3] The trustee has not raised the recoupment issue in his petition. Thus even if this Court agrees with the trustee on the § 106(c) and constitutional questions, the *Willington* case must go back to the court of appeals for review of the district court's holding on recoupment.

SUMMARY OF ARGUMENT

I. Congress did not intend Section 106(c) of the Bankruptcy Code to abrogate the Eleventh Amendment immunity of the States from federal court actions for retrospective money damages. The language of § 106(c), which provides in essence that a "determination" by a bankruptcy court of an "issue" arising under certain other Code sections "binds" governmental units, does not use the word "claim" and thus reveals an intent to subject governments only to declaratory and injunctive determinations rather than to judgments involving a right to payment. This view is consistent with the legislative history of § 106, in which Congress stated that it "does not, however, have the power to waive sovereign immunity completely with respect to claims of a bankrupt estate against a State, though it may exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy." The view that § 106(c) subjects governments to declaratory and injunctive determinations not only preserves the Eleventh Amendment immunity of the States but also furthers federal bankruptcy policy by making available various remedies against the government — such as the avoidance of property transfers and judicial liens, the use of the automatic stay, and the determination of dischargeability — that the debtor might not otherwise possess. Finally, whatever else may be said, Congress did not express an intent to authorize suits against States for past money damages with the unmistakeable clarity that this Court has consistently required in order to overcome the Eleventh Amendment immunity of the States.

II. Alternatively, Congress does not have the power under the Bankruptcy Clause to abrogate the States' Eleventh Amendment immunity from federal court actions for retrospective money damages. This Court ruled in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that the substantive provisions of the Fourteenth Amendment allowed Congress to override the Eleventh Amendment because the Fourteenth Amendment is "by express terms directed at the States." The Bankruptcy Clause of Article I, § 8, however, is not "by express terms directed at the States," does not mention the States at all, and historically has never in and of itself prohibited the enactment of state bankruptcy laws. Further, if Congress can override the Eleventh Amendment pursuant to the Bankruptcy Clause, which does not expressly or impliedly prohibit state legislation, then presumably Congress can override the Eleventh Amendment pursuant to its other plenary Article I powers, which are no more restrictive of state activity. The end result would be that Congress could in effect repeal the Eleventh Amendment in contravention of the constitutional amendment process of Article V.

ARGUMENT

I. CONGRESS DID NOT INTEND SECTION 106(c) TO ABROGATE THE ELEVENTH AMENDMENT IMMUNITY OF STATES FROM FEDERAL COURT ACTIONS FOR RETROSPECTIVE MONEY DAMAGES.

When Congress enacted the Bankruptcy Code in 1978, it did so against a background of contemporaneous decisions by this Court revealing that only under very limited circumstances could Congress empower the federal courts to entertain private suits against the States. The underlying basis for these decisions was, of course, both the Eleventh Amendment and "its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Thus in 1973 this Court held in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), that the Fair Labor Standards Act did not authorize individual federal court actions against the States, since there was no "clear language" to that effect. *Id.* at 285. One year later in *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court decided that federal courts could award only prospective equitable relief and not retrospective monetary relief against the States. And in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court concluded that Congress could override the Eleventh Amendment pursuant to § 5 of the Fourteenth Amendment, since the substantive provisions of the Fourteenth Amendment are "by express terms directed at the States." *Id.* at 453.

Congress acted with presumptive knowledge of these limitations. *See Goodyear Atomic Corp. v. Miller*, 108 S.Ct. 1704, 1711-12 (1988).[4] Indeed, in both the House and Senate Report

[4] Bankruptcy courts, being federal courts, are also subject to the Eleventh Amendment as a limitation on their jurisdiction. *See Ohio v. Madeline Marie Nursing Home #1 and #2*, 694 F.2d 449, 459 (6th Cir. 1982).

on § 106 Congress stated its belief that it "does not, however, have the power to waive sovereign immunity completely with respect to claims of a bankrupt estate against a State, though it may exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy." S. Rep. No. 989, 95th Cong., 2d Sess. 29-30, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5815 (hereinafter Senate Report); H. R. Rep. No. 595, 95th Cong., 2d Sess. 317, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6274 (hereinafter House Report). A proper construction of § 106(c), therefore, must reflect the belief of Congress itself that it had only limited ability to authorize actions against the States.

Even assuming, however, that Congress acting pursuant to the Bankruptcy Clause believed it had and in fact did have unlimited power in this regard — a point we dispute in part II of this brief — Congress would have stated its intentions to authorize suits against States for money damages in "clear language," as required by this Court in *Employees*. This Court, in fact, has cautioned that it will not find a Congressional abrogation of sovereign immunity unless Congress makes its intention "unmistakeably clear in the language of the statute," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), and that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment." *Id.* at 243. Stated differently, a court must strictly construe alleged waivers of sovereign immunity in favor of the sovereign. *McMahon v. United States*, 342 U.S. 25, 27 (1951).

1. Only paragraphs (a) and (b) of § 106 clearly authorize actions for money damages against the State under certain circumstances.[5] No dispute exists that paragraph (a) of § 106

[5] Section 106 provides as follows: *Waiver of sovereign immunity* (a) A governmental unit is deemed to have waived sovereign immunity with

(continued)

waives Eleventh Amendment immunity with respect to any claim of the debtor that arises from the same transaction or occurrence as the claim asserted by a governmental unit. Paragraph (b) effects an additional waiver of immunity by providing for the offsetting, without affirmative recovery, of any claim of the debtor against a governmental unit that possesses an allowed claim or interest, regardless of whether the debtor's claim arises from the same transaction as the government's claim. Respectively, these subsections authorize claims in the nature of compulsory and permissive counterclaims against governmental units. *See* Senate Report, *supra; House Report, supra.* Such an interpretation poses little conflict with the Eleventh Amendment, because the assertion of a claim by the State constitutes at least a limited implied waiver of Eleventh Amendment immunity. *See Mohegan Tribe v. State of Connecticut,* 528 F. Supp. 1359, 1367 (D. Conn. 1982).

Paragraph (c) begins with the phrase "[e]xcept as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity." The plain language of this phrase reveals that paragraph (c) applies when the government has not asserted a claim ("except as provided in subsections (a) and (b)") and regardless of any sovereign immunity defense that the government may assert. *See also* App. to Pet. at A92-A93 (wherein district court strictly construes introductory language to limit waiver of Eleventh Amendment immunity).

The introduction itself, of course, says nothing about what types of actions paragraph (c) authorizes. The substantive portion of paragraph (c) begins with subparagraph (1), which insures that any provision of the Code containing the triggering term "creditor," "entity," or "governmental unit" applies to governmental units. Subparagraph (1) is then linked by the conjunction "and" to subparagraph (2), which provides that "a determination by the court of an issue arising under such a provision binds governmental units." The contrast between this language and that in paragraphs (a) and (b) is quite instructive. Whereas paragraphs (a) and (b) use the phrase "claim against [a] governmental unit" to refer to actions for money damages, paragraph (c)(2) provides only that a "determination" by the court of an "issue" arising under a provision containing a triggering term "binds" governmental units. The term "claim," which Congress defined to include a "right to payment," 11 U.S.C. § 101(4)(A), is noticeably absent from paragraph (c)(2). And the terms "determination," "issue," and "binds" that Congress did employ in (c)(2) refer more readily to declaratory judgment actions than to money damage actions. *See, e.g.,* 11 U.S.C. § 505 ("Determination of tax liability").[6] Certainly the phraseology in paragraph (c)(2) would constitute an awkward way for Congress to authorize suits for monetary relief against sovereigns when Congress had used the relatively clear phrase "claim against [a] governmental unit" in paragraph (a) and (b). The plain language of § 106(c), then, does not support the trustee's interpretation of this section as authorizing actions for money damages.

2. The legislative history, well documented elsewhere, *see In re T&D Management Co.,* 40 B.R. 781, 784-87 (Bankr. D. Utah 1984), also does not bear out the trustee's expansive view of § 106(c). A 1973 draft of the Bankruptcy Code would have made all Code provisions binding on all governmental

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[5] *(continued)*
respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity — (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and (2) a determination by the court of an issue arising under such a provision binds governmental units.

[6] Other substantive sections that employ a variation of the word "determination" include 11 U.S.C. § 502(b) ("determine" the amount of a claim), 11 U.S.C. § 506 ("Determination of secured status"), and 11 U.S.C. §§ 523(a)(3)(B), 524(a)(1), (d)(2), and 727(a)(5) (determining dischargeability). In none of these sections would the result of such determinations require an actual outlay of public funds.

units. Congress did not approve this proposal. *Id.* at 784–85. Several years later the House and Senate proposed the original version of § 106. As proposed, § 106 contained only the equivalents of subsections (a) and (b) and did not include subsection (c). It was the House and Senate Reports to this original version that contained the statement, referred to earlier, that "Congress does not, however, have the power to waive sovereign immunity completely with respect to claims of a bankrupt estate against a State, though it may exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy." The remainder of the Senate and House Reports describe the operation of paragraphs (a) and (b) as compulsory and permissive counterclaim provisions. Significantly, the Reports take care to point out that such provisions fall "within Congress' power vis-a-vis both the Federal Government and the States." Senate report, *supra;* House Report, *supra.*

While a Conference Committee would later amend paragraphs (a) and (b) and add paragraph (c) to § 106, no evidence exists that Congress would have altered its view that it had only limited power to override State Eleventh Amendment immunity. The floor debates contain the following passage by the managers of the compromise bill:

> Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor", "entity", or "governmental unit" in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. Section 106(c) codifies *In re Gwilliam,* 519 F.2d 407 (9th Cir. 1975), and *In re Dolard,* 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in sections 106(a) and (b), subsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under Title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby overruled.

124 Cong. Rec. 32394 (1978) (remarks of Rep. Edwards); 124 Cong. Rec. 33993 (1978) (remarks of Sen. DeConcini).

The new element in this passage is the pronouncement that § 106(c) codifies the result in *In re Gwilliam,* 519 F.2d 407 (9th Cir. 1975), and *In re Dolard,* 519 F.2d 282 (9th Cir. 1975). Both *Gwilliam* and *Dolard* were cases arising under the former Bankruptcy Act in which a trustee sought to resolve the status of the estate's tax indebtedness to the Internal Revenue Service (hereinafter IRS). They were part of a "recurring confrontation between the IRS and the bankruptcy trustees which result[ed] from the adamant refusal of the IRS to present claims for or otherwise prove unpaid tax items in bankruptcy proceedings." *In re Gwilliam,* 519 F.2d at 409. The basis of the IRS position was that the Bankruptcy Act contained no provision waiving sovereign immunity and that unless the IRS presented a proof of claim it was immune by virtue of sovereignty from the effect of all bankruptcy actions. *See In re Gwilliam,* 519 F.2d at 408–09; *In re Dolard,* 519 F.2d at 284. Indeed, at about the same time the State of Connecticut took the similar position in the Second Circuit that sovereign immunity insulated it from the discharge of debts owed the State. *In re Crisp,* 521 F.2d 172, 178 (2d Cir. 1975).

Gwilliam and *Dolard* rejected the IRS stance and held that an IRS proof of claim was not a prerequisite to the

discharge or other disposition of federal tax indebtedness. By codifying *Gwilliam* and *Dolard*, § 106(c) put to rest the notion that a government could assert sovereign immunity as a bar to discharge. This result was not so much a waiver of sovereign immunity as a clarification of what sovereign immunity embraces. For as this Court had observed in *Edelman* several years earlier, the essence of sovereign immunity is protection from "a suit by private parties seeking to impose a liability which must be paid from public funds in the . . . treasury." 415 U.S. at 663. A judgment of dischargeability, however, "does not . . . deplete [the government's] coffers by a penny." *In re Crisp, supra.* Thus the apparent purpose of § 106(c) was to eliminate all government objections ("notwithstanding any assertion of sovereign immunity") to certain lawsuits that in reality did not implicate true sovereign immunity concerns. Viewed in this light, § 106(c) represents an entirely appropriate assertion of federal supremacy over issues of federal law that does not implicate the State's Eleventh Amendment immunity from federal court suits seeking past money damages.

The statement by the floor managers that paragraph (c) is "included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective" does not reveal a contrary intent. This passage illustrates at most that Congress may have believed that an equitable action against a government official represented a limited infringement of sovereign immunity that Congress had the power to override, rather than an infringement on the State's retrospective Eleventh Amendment immunity. Indeed, Congress expressed a similar belief in enacting the automatic stay provision in 11 U.S.C. § 362. Although § 362 did not expressly authorize actions for money damages in 1978, the Senate and House stated in their Reports that § 362 is "intended to be an express waiver of sovereign immunity of the Federal Government, and an assertion of the bankruptcy power over State governments under the Supremacy Clause notwithstanding a State's sovereign immunity." *See* S. Rep. No. 989, 95th Cong., 2d Sess. 51 *reprinted in* 1978

U.S. Code Cong. & Ad. News 5837; H.R. Rep. No. 595, 95th Cong., 2d Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6299.[7] Thus Congress may well have seen an injunction against a government official as an infringement on sovereign immunity, but one that it had the power to authorize. *See United States v. Mel's Lockers*, 346 F.2d 168 (10th Cir. 1965) (holding that sovereign immunity barred an injunction against the government); *McAvoy v. United States*, 178 F.2d 353, 356 (2d Cir. 1949) (same).

The remainder of the passage from the Congressional Record concerning § 106(c) states that "subsection (c) is not limited to [the] issues [in *Gwilliam* and *Dolard*], but permits the bankruptcy court to bind governmental units on other matters as well" and that, for example, "section 106(c) permits a trustee or debtor in possession to assert avoiding powers under Title 11."[8] The most likely explanation for this language is that Congress sought to remedy the fact that under prior law the United States was immune from actions to avoid the transfer of property even when the government filed a proof of claim. *See, e.g., In re American Boiler Works, Inc.*, 123 F.Supp. 352, 354 (W.D. Pa. 1954), *aff'd*, 220 F.2d 319

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[7] Congress amended § 362 in 1984 to add paragraph (h), which created a generalized right of action for money damages for violation of the automatic stay. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353 § 304, 98 Stat. 333, 352 (1984). Prior to that time several bankruptcy courts that had found government agencies in contempt of the automatic stay had awarded fines, costs, or other damages to the debtor. *See In re Mack*, 46 Bankr. 652, 656–57 (Bankr. E.D. Pa. 1985); *In re Burrow*, 36 Bankr. 960, 964–68 (Bankr. D. Utah 1984); *In re Pyramid Restaurant Equipment Co.*, 24 Bankr. 455 (Bankr. W.D.N.Y. 1982). The power to order monetary relief as a result of a finding of contempt, however, is ancillary to a federal court's injunctive powers and thus does not infringe the Eleventh Amendment. *See Hutto v. Finney*, 437 U.S. 678, 691 (1978).

[8] The floor managers added: "contrary language in the House Report to H.R. 8200 is thereby overruled." The overruled language was as follows: "[T]he trustee would be able to recover [a preferential transfer] only if the taxing authority did not have sovereign immunity or had waived it under proposed 11 U.S.C. 106." *See* H.R. Rep. No. 595, 95th Cong., 2d Sess. 373, *reprinted in*, 1978 U.S. Code Cong. & Ad. News 6329.

(3d Cir. 1955). In addition, Congress undoubtedly sought to provide for certain preference actions to void liens or obtain other injunctive or declaratory relief that would not call for a monetary award from the treasury. *See, e.g.*, 11 U.S.C. § 362(a) (providing for an automatic stay "applicable to all entities" of actions against the debtor). Expressed in 1978, such a purpose would have essentially codified the *Edelman* ruling, handed down only four years earlier, that Eleventh Amendment immunity does not bar a request for prospective equitable relief from a state official. And it would have made real the desire of Congress to "exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy." Senate Report, *supra;* House Report, *supra.*

Reduced to its essential, the legislative history of § 106 reveals two salient points. First, throughout the Reports and floor statements there is not one express mention of the prospect of monetary recovery from a sovereign in the absence of a proof of claim. It follows necessarily that the legislative history does not represent an "unequivocal expression of congressional intent" in this regard. *See Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 99 (1984). Second, Congress believed that it did not "have the power to waive sovereign immunity completely." It is particularly this second point that the trustee overlooks. This expressed belief of Congress flatly contradicts the trustee's position that Congress waived sovereign immunity completely with regard to sections of the Code containing one of the three triggering terms.

3. The interpretation of § 106(c) advanced herein not only preserves the essential attributes of sovereign immunity, but also breathes life into a number of possible bankruptcy actions against the sovereign. The *Zerq* case, of course, concerns the avoidance of a preferential transfer under § 547. Section 547 does not, however, by its own terms apply to governmental units. Its availability for actions against state and federal governments stems instead from the fact that

§ 547(b)(1) uses the term "creditor" and § 106(c)(1) makes such a provision applicable to governmental units. By virtue of § 106(c) a debtor can thus seek to avoid the preferential transfer of property or seek to avoid a judicial lien in favor of the government — actions that under the Bankruptcy Act met with resistance from both the government and the courts. *See In re American Boiler Works, Inc., supra.*[9]

Similarly, § 106(c) extends to government the injunctive force of the automatic stay of § 362(a), which expressly applies to "all entities" and which constitutes "one of the fundamental debtor protections provided by the bankruptcy laws." S. Rep. No. 989, 95th Cong., 2d Sess. 54, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5840. Moreover, § 106(c) effectively includes the government as a "creditor" within the meaning of § 506(a), which provides that for the purposes of assessing the value of a creditor's security interest in property held by the estate, "such value shall be *determined* in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a) (emphasis added). And § 106(c) in essence makes the government subject to dischargeability determinations. It does so because § 727(b) discharges a debtor from all unexcepted prepetition debts, § 727(c) preserves the right of a trustee or a "creditor" to object to the granting of a discharge, and § 523(c) permits "creditors" to object to the dischargeability of particular debts. Section 525(a), in addition, prohibits a "governmental unit" from refusing to grant a license or

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[9] Section 547 does not authorize actions for monetary relief or otherwise detail the liability of the transferee of an avoidable transfer. It is § 550 that addresses these concerns. Section 550(a)(1) provides that the trustee may recover the property transferred or, if the court so orders, "the value of such property," from "the initial transferee of such transfer or the entity for whose benefit such transfer was made." Since the phrase "the initial transferee of such transfer," which most clearly refers to the State in *Zerq*, does not contain a § 106(c)(1) triggering term, the State questions how the trustee can prevail in *Zerq* even if this Court agrees with his interpretation of § 106(c). The court of appeals should consider this issue on remand in the event that this Court reverses.

similar privilege solely because the debtor has not paid a discharged debt. Finally, § 106(c) also allows courts to make numerous other equitable determinations that would affect governmental units.[10]

On the other hand, the trustee's view that § 106(c) also authorizes actions for past money damages would provide § 106(c) with such an expansive role that it would largely render §§ 106(a) and 106(b) unnecessary. It is true, of course, that even under the trustee's view paragraph (c) would only apply to Code sections containing a triggering term, while paragraphs (a) and (b) would authorize actions for money damages under all Code sections whenever the government has filed a proof of claim. The fact of the matter, however, is that there are very few, if any, Code sections authorizing monetary relief that do not contain a triggering term.[11] Hence

[10]These determinations include matters authorized by the following Code sections: Section 361 (the court can bind an "entity" on a determination concerning an order of adequate protection for a secured party); § 363(c)(2) (the court may authorize the use of cash collateral by the trustee in which an "entity" has an interest, subject to a determination of adequate protection); § 363(e) (the court, at the request of an "entity," can determine the rights of an "entity" in property and condition the use, sale or lease of such property); § 363(f) (the court can permit the sale free and clear of the interest of an "entity" in property); § 503(a) (at the request of an "entity," the court can determine whether an expense incurred by the estate is entitled to administrative expense status); § 506(a) (the court can determine the extent to which an allowed claim of a "creditor" is secured); § 522(e) (the court can determine whether a waiver of an exemption by the debtor in favor of a "creditor" is valid); § 552(b) (the court can determine the post-petition effect of a security interest held by an "entity"); § 553(a) (the court can determine the right of a "creditor" to set-off a debt owed to it, by a debt it owes a "creditor"); § 725 (the court can determine the disposition of property to which the estate and an "entity" have an interest); §§ 1129(d), 1141(a), 1146 (the court may make determinations to bind a "governmental unit" respecting the confirmation of plans).

[11]The only sections that the trustee has identified as not containing the triggering language are §§ 545 and 549. Pet. Br. at 24. These sections, however, authorize only lien avoidance, and do not by their own terms authorize the recovery of monetary damages. As suggested in footnote

(continued)

the trustee's interpretation of § 106(c) would essentially subsume the need for paragraphs (a) and (b), thus creating the presumptively unlikely result that Congress enacted superfluous legislation. *See Platt v. Union Pacific Railway Co.*, 99 U.S. 48, 58-59 (1878); App. to Pet. at A65-A67.

The trustee also maintains that unless § 106(c) also authorizes actions for money damages then bankruptcy policy would suffer and States would become a species of supercreditors. The petitioner is wrong on several counts. First, to a considerable extent Congress has already made a distinction between the government and nonsovereign creditors. Numerous unsecured claims of governmental units receive a priority status in distribution, *see* 11 U.S.C. §§ 503(b)(1)(B), 507(a)(7), 1129(a)(9)(C), and numerous claims of governmental units are excepted from discharge. *See* 11 U.S.C. § 523(a)(1), (7), (8). At the same time that Congress has provided additional protection for governmental units, it has also set forth certain limitations. A governmental unit is not a "person" as defined by § 101(35) and, therefore, even if the government is an unsecured creditor, it cannot become a member of a creditors' committee under 11 U.S.C. § 1102 or serve as a trustee under any chapter. *See* 11 U.S.C. § 321(a). The differing treatment afforded the State recognizes the unique position of the State as a creditor. In most instances, particularly in regard to unpaid taxes, the State becomes a creditor involuntarily. It cannot choose its clientele and thus cannot engage in the weighing of gains and risks normally undertaken by a creditor before extending credit to a customer.

Second, the drafters of the Bankruptcy Code did not elevate the desire to rehabilitate debtors above all other public

[11] *(continued)*
9 *supra*, it is significant that § 550, which is the only section that authorizes the recovery of the value of property avoided under §§ 544, 545, 547, 548, 549, 553(b), and 724(a), refers to "transferees" throughout the section, does not employ the triggering words "governmental unit" or "creditor," and uses the word "entity" only in a limited, insignificant context. *See* 11 U.S.C. § 550(a)(1).

policy considerations. The Code, for example, accommodates the "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." *Kelly v. Robinson*, 479 U.S. 36, 47 (1986). *See also Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986) (trustee's abandonment power is subject to state environmental laws). Similarly, our interpretation of § 106(c) accommodates both the Eleventh Amendment and the express recognition of Congress that unconsenting States should not become subject to federal court money judgments. The interpretation of § 106(c) lent by the petitioner would override these concerns completely.

4. While the State believes that the language of the Code, its legislative history, and related policy concerns make clear that Congress did not intend § 106(c) to authorize suits for money damages against state and federal governments, the State submits that at the very least Congress did not express a contrary intent with the unmistakeable clarity that this Court has required in order to overcome the Eleventh Amendment immunity of the States. *Atascadero State Hospital v. Scanlon*, 473 U.S. at 242. Since "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment," *id.* at 243, and there is no basis for such certainty here, this Court should reject the trustee's interpretation of § 106(c).[12]

[12]The trustee makes the additional argument that § 106(c), when woven together with a provision such as § 542(b) that contains a § 106(c) triggering term, supplies the necessary clarity to constitute an abrogation of Eleventh Amendment immunity. Pet. Br. at 14. This Court rejected a similar argument in *Atascadero*. Section 505 of the Rehabilitation Act, at issue in that case, provided a remedy in damages against "any recipient of Federal assistance" found to have discriminated against a handicapped person. The implementing regulations and the legislative history made clear that Congress envisioned States as among the recipients of federal assistance. This Court nonetheless concluded that the general authorization for suit contained in § 505 was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 U.S. at 246. *See also id.* at 249-52 (Brennan, J., dissenting).

II. ALTERNATIVELY, CONGRESS DOES NOT HAVE THE POWER UNDER THE BANKRUPTCY CLAUSE TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY FROM FEDERAL COURT ACTIONS FOR RETROSPECTIVE MONEY DAMAGES.

Assuming this Court should find that Congress unequivocally intended in § 106(c) to override the States' Eleventh Amendment immunity from federal court money damage actions, the State nevertheless contends that Congress lacks the power to do so acting pursuant to the Article I § 8 Bankruptcy Clause. The basis of this argument is twofold: (1) the Article 1 § 8 powers of Congress are not by their own terms limitations on state authority and (2) construing Article I § 8 to confer such power on Congress would mean emasculation of the Eleventh Amendment.

The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although its terms do not literally prohibit federal suits brought by a citizen against his own State, this Court held in *Hans v. Louisiana*, 134 U.S. 1 (1890), that the federal judicial power does not extend to such suits. The trustee is a Connecticut citizen and thus falls within the *Hans* rule.[13]

The Eleventh Amendment does not, of course, prohibit all federal court suits against the States. This Court in *Edelman* relied on the rule of *Ex Parte Young*, 209 U.S. 123

[13]The trustee does not ask this Court to overrule *Hans*. In any event, this Court has recently and repeatedly reaffirmed *Hans*. *See Welch v. Texas Department of Highways and Public Transportation*, 107 S.Ct. 2941, 2948-57 (1987) (plurality opinion); *Atascadero State Hospital v. Scanlon*, 473 U.S. at 243 n.3; *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 97-99; *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. at 280.

(1908), to make clear that the Eleventh Amendment tolerates private suits against state officers for prospective injunctive and declaratory relief. The Eleventh Amendment poses no bar to federal court suits by other States or by the United States. *See Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981); *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. at 286. And States can consent to Eleventh Amendment jurisdiction, provided such consent is "unequivocally expressed." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 99.[14]

Finally, this Court ruled in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress can override the Eleventh Amendment when enforcing § 1 of the Fourteenth Amendment provided, of course, that Congress expresses its intent to do so in clear language. The *Fitzpatrick* Court thus held that Congress could constitutionally authorize federal courts to award money damages against a state government found to have committed employment discrimination prohibited by Title VII of the Civil Rights Act. *See* Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972). The Court observed that the substantive provisions of the Fourteenth Amendment, which provide that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," are "by express terms directed at the States," 427 U.S. at 453, and "by their own terms embody limitations on state authority." *Id.* at 456. The Court concluded that when Congress enforces this provision pursuant to § 5 of the amendment it may provide for suits against States or state officials "which are constitutionally impermissible in other contexts." *Id.*

This Court has not extended *Fitzpatrick* to Congressional enforcement of other constitutional provisions. In the cases in which the issue has existed, the decisions have turned on

[14]The trustee does not claim that Connecticut has consented to federal court jurisdiction.

the fact that Congress did not express an intent to abrogate the Eleventh Amendment in clear language, thus making resolution of the constitutional question unnecessary. *See Welch v. Texas Department of Highways and Public Transportation*, 107 S.Ct. at 2946–47 & n.5 (Jones Act, enacted pursuant to the Commerce Clause, not unmistakenly clear); *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252 (1985) (Indians' claim for indemnification does not arise under the Nonintercourse Act, which was enacted pursuant to the Indian Commerce Clause); *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. at 285 (Fair Labor Standards Act, enacted under the Commerce Clause, did not contain clear language). *See also Atascadero State Hospital v. Scanlon*, 473 U.S. at 244 & n.4 (Rehabilitation Act, enacted pursuant to the Fourteenth Amendment, not unequivocal).[15]

1. As the trustee emphasizes, the Seventh Circuit in *In re McVey Trucking, Inc.*, 812 F.2d 311, 314–23 (7th Cir.), *cert. denied*, 108 S.Ct. 227 (1987), has held that Congress can override the Eleventh Amendment pursuant to the Bankruptcy Clause. The most obvious response to *McVey* is that the express language of the *Fitzpatrick* opinion itself prohibits its application to legislation enacted pursuant to the Bankruptcy Clause. For, unlike the Fourteenth Amendment, the Bankruptcy Clause is not "by express terms directed at the States" and does not "by [its] own terms embody limitations on state authority." 427 U.S. at 456. Indeed, the Bankruptcy Clause states only that "[t]he Congress shall have Power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States" and does not mention the States at all. The Bankruptcy Clause thus stands in

[15]At the time of this writing, this Court has not yet decided *Pennsylvania v. Union Gas Co.*, 832 F.2d 1343 (3rd Cir. 1987), *cert. granted*, 108 S.Ct. 1219 (1988), raising the question of whether Congress in enacting the Comprehensive Environmental Response, Compensation and Liability (or Superfund) Act authorized private suits against the States and, if so, whether it can do so pursuant to the Commerce Clause.

contrast with other Article I provisions relating to such topics as bills of attainder, impairment of contracts, and duties of tonnage that commence with the phrase "No State shall" and that would seem to fall within the *Fitzpatrick* rule. *See also* Article IV § 1 (requiring States to give full faith and credit to proceedings of other States); Article IV § 2 (requiring States to deliver fugitives).[16]

Further, this Court has never considered the Bankruptcy Clause in and of itself to act as a prohibition on state activity. The original passage of the Bankruptcy Clause in 1787 stemmed from the need to establish a uniform bankruptcy law enforceable in all the States as well as a desire to prohibit Congress from enacting private bankruptcy laws. *See Railway Labor Executives Association v. Gibbons*, 455 U.S. 457, 471-72 (1982). Congress acted quickly to establish the first Bankruptcy Act in 1800 but it expired in 1803. A second Bankruptcy Act did not come into being until 1841. Due to the second Act's unpopularity, Congress repealed it in little more than a year. A third attempt at federal bankruptcy legislation lasted only from 1867 to 1878. It was not until 1898 that Congress enacted the Bankruptcy Act that remained in effect until the 1978 reform. *See* P. Murphy, *Creditors' Rights in Bankruptcy*, pp. 1-2-1-7 (2d ed. 1988).

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[16] Article I, § 10 provides: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

During the intervals between federal acts this Court repeatedly reaffirmed the power of the States to enact bankruptcy legislation. In the first case, *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), Chief Justice Marshall wrote for the Court with regard to a New York statute that "it is sufficient to say, that until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the States are not forbidden to pass a bankrupt law, provided it contain no principle which violates [the impairment of contracts clause]." *Id.* at 196-97. Chief Justice Marshall also stated: "It is not the mere existence of the [bankruptcy] power, but its exercise, which is incompatible with the exercise of the same power by the States." *Id.* at 196. Relying on *Sturges* this Court then made similar pronouncements in four subsequent cases. *See Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 273 (1824); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 228 (1864); *Gilman v. Lockwood*, 71 U.S. (4 Wall.) 409, 410 (1867); *Brown v. Smart*, 145 U.S. 454, 457 (1892).

Although this Court has more recently stated that the power of Congress to establish uniform bankruptcy laws is "unrestricted and paramount," *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929), it is apparent that Congress has asserted that power by choice rather than constitutional mandate. The history of the Bankruptcy Clause reveals that it has served as a grant of power to Congress to exercise at its option rather than an express or implied prohibition of State activity. For this reason alone, the Bankruptcy Clause does not fall within the *Fitzpatrick* doctrine.

2. A second reason why the *Fitzpatrick* doctrine does not apply to the Bankruptcy Clause relates to the continued vitality of the Eleventh Amendment itself. For if Congress can override the Eleventh Amendment pursuant to the Bankruptcy Clause, which does not expressly or impliedly prohibit state legislation, then it is hard to see why Congress cannot do so pursuant to the other Article I, § 8 powers, such as the taxing and spending power, the commerce power, the naturalization law power, the copyright and patent power, and the

necessary and proper clause. These powers, no more than the Bankruptcy Clause, do not "by their own terms embody limitations on state authority." *Fitzpatrick v. Bitzer, supra.* And since there is very little legislation that Congress cannot justify under one of these powers, *see, e.g., Perez v. United States*, 402 U.S. 146 (1971) (Congressional prohibition of loan sharking upheld under the Commerce Clause), Congress under this scenario would possess the power to strip the Eleventh Amendment of all meaning.

This Court has previously expressed its concern over arguments that "would emasculate the Eleventh Amendment." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 106. Indeed, when this Court in *Fitzpatrick* observed that Congress could authorize suits against the States pursuant to the Fourteenth Amendment that "are constitutionally impermissible in other contexts," 427 U.S. at 456, it surely recognized that other contexts did in fact exist. If Congress and the citizenry are dissatisfied with the fact that the Eleventh Amendment does bar some suits against the States, then the proper recourse is the constitutional amendment process of Article V. *See, e.g.*, U.S. Const., amend. XXI (repealing the Eighteenth Amendment on prohibition). As long as the Eleventh Amendment remains part of our Constitution, however, it is improper to dismantle it by an expansive and unlimited stretching of *Fitzpatrick*. Just as this Court has found the Bankruptcy Clause to be subject to the Fifth Amendment, *see Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935), this Court should conclude that the Bankruptcy Clause does not override the Eleventh Amendment.[17]

3. The petitioner makes essentially two arguments in response. Relying on *McVey*, the petitioner first asserts that

[17]Indeed, if Congress can abrogate the Eleventh Amendment pursuant to its Article I bankruptcy power, then the possibility exists that Congress can override other Constitutional amendments under this and other Article I powers, thus significantly altering our Constitutional scheme.

the Eleventh Amendment limits only the power of the federal judiciary to construe its Article III jurisdiction to include diversity suits against the States and does not limit the power of Congress to confer federal question jurisdiction, including federal question suits against the States, on the federal courts. Pet. Br. at 21–22. This argument belies the original and recent history of the Eleventh Amendment.[18] The Eleventh Amendment overruled the 1793 decision in *Chisholm v. Georgia*, 2 U.S. (23 Dall.) 419 (1793), which had held that Georgia was liable in federal court in assumpsit to a South Carolina plaintiff. The decision in *Chisholm* "literally shocked the Nation," *Edelman v. Jordan*, 415 U.S. at 662, and the reaction was "swift and hostile." *Welch v. Texas Department of Highways and Public Transportation*, 107 S.Ct. at 2951. The Eleventh Amendment passed both Houses of Congress in 1794, was ratified by the necessary twelve States in 1795, and was announced by the President in 1798. *Id.* Given this history, it is hard to imagine that the framers of the Eleventh Amendment could have intended its protections to evaporate at the whim of Congress. As this Court put in *Hans:*

> Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States; can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

Hans v. Louisiana, 134 U.S. 1, 15 (1890).

[18]To the extent the petitioner also suggests that the Eleventh Amendment presents no impediment at all to any Congressional grant of jurisdiction, the suggestion conflicts with the teaching of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). As that case held, Congress has no authority to add to the federal judicial power in a way not authorized by the Constitution.

Moreover, the recent Eleventh Amendment decisions of this Court have explicitly and implicitly rejected the proposed limitation of the Eleventh Amendment to diversity cases. This Court stated in *Pennhurst* that the Amendment "is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts." 465 U.S. at 120 (emphasis in original). And this Court would have had no occasion to examine whether Congress had intended to override the Eleventh Amendment in the federal legislation at stake in *Welch*, *Atascadero*, and *Employees* if the Eleventh Amendment did not pose at least an initial bar to federal question suits against the States.

The trustee advances the additional contention that through the enactment of the Bankruptcy Clause the States surrendered their sovereignty and, apparently, their immunity from suit to the federal government. While it is true that at the time of ratification the States surrendered their sovereign power to enact state bankruptcy laws that would compete with a uniform federal bankruptcy code, it does not follow that they also relinquished their immunity from suit. "The truth is, that the cognizance of suits and actions [against unconsenting States] was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans v. Louisiana*, 134 U.S. at 15. Although this Court departed from this notion in *Chisholm*, the enactment of the Eleventh Amendment essentially reinstated the status quo ante. As Justice Marshall has observed, the Eleventh Amendment "clarif[ied] the intent of the Framers concerning the reach of the federal judicial power" and "restore[d] the original understanding" that the Article III judicial power "would not provide a mechanism for making States unwilling defendants in federal court." *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. at 291-92 (Marshall, J., concurring in the result).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted.

STATE OF CONNECTICUT
Department of Income Maintenance
Department of Health Services
Department of Revenue Services

RESPONDENTS

CLARINE NARDI RIDDLE
DEPUTY ATTORNEY GENERAL
(ACTING ATTORNEY GENERAL)

KENNETH A. GRAHAM
Assistant Attorney General

CARL J. SCHUMAN*
Assistant Attorney General
55 Elm Street
Hartford, Connecticut 06106
Telephone: (203) 566-4990

JOAN E. PILVER
Assistant Attorney General

*Counsel of Record for
State Respondents

RESPONDENT'S

BRIEF

(8)

No. 88-412

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARTIN W. HOFFMAN, TRUSTEE, PETITIONER

v.

STATE OF CONNECTICUT,
DEPARTMENT OF INCOME MAINTENANCE, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS A RESPONDENT

WILLIAM C. BRYSON
Acting Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

TRACY J. WHITAKER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

37pp

QUESTION PRESENTED

Whether Section 106(c) of the Bankruptcy Code permits a bankruptcy trustee to bring an action against a State in federal bankruptcy court seeking retroactive monetary relief.

PARTIES TO THE PROCEEDING

In addition to Martin W. Hoffman, Trustee, and the State of Connecticut's Department of Income Maintenance, the State's Department of Health Services, its Department of Revenue Services, and the United States are parties to the proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 850 F.2d 50. The opinion of the district court in *In re Willington Convalescent Home, Inc.* (Pet. App. A20-A71) is reported at 72 Bankr. R. 1002. The opinion of the district court in *In re Edward Zera* (Pet. App. A72-A97) is reported at 72 Bankr. R. 997. The opinion of the bankruptcy court in *In re Willington Convalescent Home, Inc.* (Pet. App. A98-A143) is reported at 39 Bankr. R. 781. The opinion of the bankruptcy court in *In re Edward Zera* (Pet. App. A144-A185) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1988. The petition for a writ of certiorari was

filed on September 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. 106 provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a govermental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

STATEMENT

Petitioner, Martin W. Hoffman, is the trustee in two unrelated bankruptcy cases, *In re Willington Convalescent Home, Inc.*, Debtor, No. 2-82-00508, and *In re Edward Zera*, Debtor, No. 2-83-00754, pending in the United States Bankruptcy Court for the District of Connecticut. In each case, he commenced adversary proceedings in the bankruptcy court against the State of Connecticut seeking monetary relief. The court of appeals affirmed the district court's dismissal for lack of jurisdiction, thus rejecting the

bankruptcy court's finding that 11 U.S.C. 106(c) authorizes trustees to bring suits for money judgments against government agencies.

1. The Willington Convalescent Home, Inc., was a nursing home operator which participated in the Connecticut Medicaid program. After a field audit in 1980 determined that Willington had overstated its real property costs, resulting in excess reimbursements by the State for five years, the State began to recoup these past overpayments from its current payments to Willington. In 1982, Willington filed a petition under Chapter 11 of the Bankruptcy Code. It continued to operate and participate in the Medicaid program until it closed in April 1983; at that time it still owed Connecticut $121,408. Although the State did not file a proof of claim in the bankruptcy court, it refused to pay Willington $64,010.24 for Medicaid services rendered in March 1983. After Willington's Chapter 11 case was converted to Chapter 7, petitioner was appointed trustee and filed a turnover action under 11 U.S.C. 542(b) (see Pet. App. A6) seeking to recover the $64,010.24 from the State. The State moved to dismiss for lack of jurisdiction. Pet. App. A5-A6.

Edward Zera, who operated a maintenance service, incurred liability to Connecticut for overdue taxes and a renewal fee. Connecticut's Department of Revenue Services issued a tax warrant, which resulted in payment of $2,100.62 to the State. After Zera filed for bankruptcy, petitioner was appointed trustee and sought to avoid the $2,100.62 payment as a preference (see 11 U.S.C. 547(b)) and to recover the money paid to Connecticut (see 11 U.S.C. 550(a)). The State again moved to dismiss for lack of jurisdiction. Pet. App. A6-A7.

2. In each case, the bankruptcy court denied the State's motion to dismiss, finding that the court had jurisdiction over the trustee's action under Section 106(c). In

Willington's case, the court first noted that Section 106(c) provides that "notwithstanding any assertion of sovereign immunity—(1) a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units; and (2) a determination by the court of an issue under such a provision binds governmental unit." The court then noted that Section 542(b), the turnover provision invoked by petitioner to compel Connecticut to turn over the $64,010.24, applies to any "entity," one of the triggering words listed in Section 106(c)(1). From that, and without any discussion of Section 106(c)(2), the court concluded that "Congress has expressly provided that a State is bound by a court judgment ordering it to make payment of a matured debt and a defense of sovereign immunity against a suit brought by a trustee is unavailable" (Pet. App. A115-A116).

Having concluded that the State was subject to suit, the bankruptcy court went on to consider whether, in light of the Eleventh Amendment, the State was subject to suit in federal court. The court stated that Section 106(c) "clearly and unambiguously" subjects States to turnover actions, and further noted that the Code's jurisdictional provisions and general policies showed that Congress intended a bankrupt estate "to have the benefit of bringing all its litigation in the single federal forum" (Pet. A127, A128). The court accordingly concluded that "Congress not only waived the State's common-law sovereign immunity but intended that such waiver be enforced in the federal courts" (*id.* at A129). The court further concluded that Congress had the power under the Bankruptcy Clause, Art. I, § 8, Cl. 4, to abrogate a State's Eleventh Amendment immunity (*id.* at A135).

In Zera's case, the bankruptcy court noted that the "proceeding differs significantly from *Willington* only in that the trustee's complaint is based on § 547(b) [the preference

provision] rather than 542(b) [the turnover provision]" (Pet. App. A161). Since the preference provision applies to "creditor[s]," another triggering word under Section 106(c)(1), the court concluded that the State was also subject to an action seeking to avoid a preferential transfer (*id.* at A166).

3. Connecticut appealed both cases to the United States District Court for the District of Connecticut, arguing that Section 106(c) did not subject it to suit, and if it did, that it was unconstitutional. The district court certified to the Attorney General, pursuant to 28 U.S.C. 2403, that the constitutionality of an Act of Congress had been drawn into question, and the United States intervened. The district court then reversed the bankruptcy court's decisions.

In Willington's case, the district court agreed with the United States that, properly construed, Section 106(c) has a limited purpose: it "'subjects sovereign units to bankruptcy jurisdiction and authority when the bankruptcy courts acts pursuant to a specific grant of authority where relief of an injunctive and declaratory nature can be imposed or when the dispute arises within the bankruptcy court's in rem jurisdiction'" (Pet. App. A64-A65 n.22 (quoting U.S. Br. 9)). That reading was based on the language of Section 106(c)(2), which, unlike Sections 106(a) and 106(b), does not authorize "claim[s]" but instead provides that "a determination by the court of an issue arising under such a provision [*i.e.*, a provision containing one of the triggering terms listed in Section 106(c)(1)], binds governmental units." In addition, the district court stressed (Pet. App. A42) that it is difficult to harmonize the bankruptcy court's broad interpretation of Section 106(c) with Sections 106(a) and 106(b). Section 106(a) authorizes compulsory counterclaims against governmental units *if* the agency has filed a proof of claim in

the bankruptcy proceeding, and Section 106(b) authorizes permissive counterclaims for offset purposes, "but, again, only *after* the sovereign files its own proof of claim" (*id.* at A43 (emphasis by the court)). "The express waiver of sovereign immunity in the carefully limited circumstances provided for in subsections (a) and (b) would seem to preclude reading subsection (c) as a completely independent wide-open waiver of sovereign immunity which would permit suits against the state for retroactive money damages irrespective of whether the state had first brought suit against the estate" (*id.* at A43-A44). Noting that "waivers of sovereign immunity must be strictly construed in favor of the sovereign" (*id.* at A45-A46), particularly where the Eleventh Amendment is at issue, the court concluded that the bankruptcy court lacked jurisdiction over petitioner's turnover claim (*id.* at A69).

In Zera's case, the district court relied on its decision in *Willington*. The court again agreed with the United States (Pet. App. A94) that Section 106(c) authorizes preference actions against government agencies only where the bankruptcy court has in rem jurisdiction. The court concluded, like the United States, that nothing in the Bankruptcy Code showed that Congress plainly intended "to abrogate the states' immunity to suit in bankruptcy court for recovery of funds from the state treasury" by means of an action to avoid a preference (*id.* at A95). Thus, as in *Willington*, the district court found it unnecessary to discuss whether Congress has the power under the Bankruptcy Clause to abrogate States' immunity. The court acknowledged (*id.* at A92) that the Seventh Circuit had reached a contrary conclusion as to the proper construction of Section 106(c) in *In re McVey Trucking, Inc.*, 812 F.2d 311, cert. denied, 484 U.S. 895 (1987), which also involved a preference action.

4. The court of appeals, after consolidating the cases, affirmed the district court's conclusion that the bankruptcy court lacked jurisdiction over petitioner's claims (Pet. App. A1-A19). The court focused on the language of Section 106(c)(2), which "provides only that governmental units are *bound* by 'a *determination* by the court of *an issue* arising under' a provision containing one of the 'triggering' terms enumerated in subsection (c)(1)" (Pet. App. A12 (emphasis by the court)). "[P]articularly when read in light of 106(a) and (b)," the court said, it seems plain that Section 106(c) "waives state sovereign immunity only to the extent necessary for the bankruptcy court to determine a state's rights in the debtor's estate" (*id.* at A12-A13).

The court of appeals found support for its conclusion in the legislative history, which makes clear that the primary purpose of Section 106(c) was to codify the results in *In re Gwilliam*, 519 F.2d 407 (9th Cir. 1975), and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975), where the courts held that bankruptcy courts may determine the amount and dischargeability of unpaid taxes. Both the Senate and House bills had preserved sovereign immunity for tax authorities. S. Rep. No. 1106, 95th Cong., 2d Sess. 6 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977). Thus, if the holdings of *Gwilliam* and *Dolard* were to be preserved, it was necessary to add Section 106(c) to provide that bankruptcy courts could issue binding determinations with respect to tax liability. Members of the Conference Committee stated that this was in fact the primary purpose of Section 106(a). See 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (1978) (statement of Sen. DeConcini). Nothing in the legislative history, the court of appeals stated, "indicate[d] that the scope of the sovereign immunity waiver was intended to extend beyond *determinations* of the bankruptcy court" and to allow

original actions against a State for money damages (Pet. App. A15 (emphasis in original)).

Moreover, since "statutes that purport to waive immunity are construed strictly in the sovereign's favor" (Pet. App. A17), and Congress must abrogate Eleventh Amendment immunity with particular clarity, the court held that governmental units are not subject "to adversarial proceedings in bankruptcy that involve payment of * * * funds to the estate," except as provided in Section 106(a) (*ibid.*). Like the district court, the court of appeals noted (*ibid.*) that the Seventh Circuit had reached a contrary conclusion in *McVey*, which, like Zera's case, involved a preference action, and that the Third Circuit had reached a contrary conclusion in *In re Vazquez*, 788 F.2d 130, cert. denied, 479 U.S. 936 (1986), which involved an action to recover a debt collected in violation of 11 U.S.C. 524(a), which is comparable to the turnover action petitioner seeks to bring on behalf of Willington.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that Section 106(c) authorizes bankruptcy courts to determine government agencies' rights in debtors' estate, but does not authorize bankruptcy courts to order government agencies to pay money to bankruptcy trustees. Section 106(c)(2) states that "a *determination* by the [bankruptcy] court of *an issue* arising under such a provision [*i.e.*, a provision of the Bankruptcy Code containing one of the triggering terms listed in Section 106(c)(1)] *binds* governmental units" (emphasis added). That language—which petitioner ignores—authorizes declaratory and injunctive relief of a defensive nature that determines and limits agencies' rights in debtors' estates, but does not authorize debtors to obtain monetary awards from government agencies. When

Congress wanted to authorize monetary awards, as it did under Section 106(a), it used different language providing that bankruptcy trustees may bring *claims* against government agencies. In addition, as the district court stressed, petitioner's broad reading of Section 106(c) renders Sections 106(a) and 106(b) largely redundant.

The legislative history supports the court of appeals' construction of Section 106(c). The Commission on the Bankruptcy Laws of the United States proposed waiving sovereign immunity completely under the Bankruptcy Code, but Congress did not adopt the Commission's draft waiver provision or anything resembling it. Indeed, the congressional reports on the Bankruptcy Code show that Congress believed that it lacked the power to subject unconsenting States to suits for money damages in bankruptcy courts. The floor comments concerning Section 106(c) show that Congress thought its primary effect was to codify decisions permitting bankruptcy courts to determine the amount and dischargeability of an estate's liability to government agencies whether or not an agency filed a proof of claim.

Rules of statutory construction also support the decision below. Waivers of sovereign immunity must be unequivocally expressed and, if Congress intends to abrogate the States' Eleventh Amendment immunity, it must make its intention unmistakably clear in the language of the statute. Section 106 does not unequivocally or unmistakably authorize bankruptcy courts to order government agencies to pay money damages to bankruptcy trustees, except in the case of counterclaims arising out of the same transaction or occurrence on which an agency has filed a proof of claim as provided in Section 106(a). In addition, statutes should be construed, where possible, to avoid constitutional questions. The court of appeals' construction of Section 106(c) avoids the question, on which

this Court has reserved judgment, whether Congress may abrogate Eleventh Amendment immunity under its Article I powers.

ARGUMENT

SECTION 106(c) DOES NOT AUTHORIZE BANKRUPTCY COURTS TO ORDER GOVERNMENT AGENCIES TO PAY MONEY TO BANKRUPTCY TRUSTEES

A. Section 106(c) Provides That Bankruptcy Courts May Determine The Government's Rights In The Debtor's Estate, Not That The Debtor May Recover From the Government

Section 106(c) provides that, "notwithstanding any assertion of sovereign immunity," certain determinations by bankruptcy courts bind "governmental units," which include both federal and state agencies (11 U.S.C. 101(26) (Supp. IV 1986)). The question here is not, as petitioner suggests, whether Section 106(c) waives sovereign immunity—which it plainly does. Rather, the question is how far that waiver extends.

Section 106(c) contains two subparts. Section 106(c)(1) states that "a provision of this title that contains 'creditor', 'entity', or 'governmental unit' applies to governmental units." Thus, Section 106(c) applies only to sections of the Bankrutpcy Code containing one of those three triggering terms. Section 106(c)(2) states that "a determination by the court of an issue arising under such a provision binds governmental units." Both subparts must be satisfied before Section 106(c) applies: the two subparts are linked by the conjunction "and." The bankruptcy court ignored Section 106(c)(2) and focussed only on Section 106(c)(1), as does petitioner. But Section 106(c)(2) contains a significant limitation on the reach of Section 106(c): it does not broadly authorize bankruptcy courts to entertain any action against government agencies, but provides only that

government agencies are bound by bankruptcy court determinations of their rights in the debtor's estate.

The court of appeals' construction gives meaning to and is consistent with the language of Section 106(c)(2). As the court stated, the subsection "provides only that governmental units are *bound* by 'a *determination* by the court of *an issue* arising under' a provision containing one of the 'triggering' terms enumerated in subsection (c)(1)" (Pet. App. A12 (emphasis by the court)). The words that the court emphasized suggest declaratory relief, and the subsection does not hint at monetary relief. Moreover, the language of Section 106(c)(2) contrasts sharply with the language of Sections 106(a) and 106(b), as the court of appeals noted (Pet. App. A12). Those two provisions each address "any *claim* against such governmental unit" (emphasis added), and both provisions authorize claims for money judgments against governmental units under specified circumstances. That Section 106(c) contains different language supports the conclusion that, unlike those two provisions, it does not involve claims for money judgments.[1] From the language of Section 106(c)(2), the

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[1] Amicus Inslaw notes (Br. 10-11) that the Bankruptcy Code's jurisidictional provision, 28 U.S.C. 157 (Supp. IV 1986), contains the word "determine," and suggests that our reading of Section 106(c) necessitates the conclusion that bankruptcy courts lack jurisdiction to render money judgments against private parties. That argument lacks merit because the language of the jurisdictional provision is very different than the language of Section 106(c). The jurisdictional provision states that bankruptcy courts may determine *cases*, whereas Section 106(c) authorizes them to determine *issues*. Similarly, the jurisdictional provision authorizes bankruptcy courts to "enter appropriate orders and judgments" (§ 157(b)(1)), whereas Section 106(c) merely states that government agencies are "bound" by bankruptcy court "determination[s]." Moreover, "determine" was added to the jurisdictional provision in 1984, and what Congress meant in adopting a provision of Title 11 in 1978 containing "determination" is not a good

court of appeals correctly concluded that Section 106(c) waives sovereign immunity "only to the extent necessary for the bankruptcy court to determine [the government's] rights in the debtor's estate" (Pet. App. A13).[2]

The most obvious flaw in petitioner's and the bankruptcy court's reading of Section 106(c) is that, as their inattention to Section 106(c)(2) suggests, they view it as adding nothing to the statute. In their view, the meaning of Section 106(c) would not change at all if the second clause were eliminated. But, of course, statutes are to be construed so that each subpart has meaning.[3]

Petitioner's broad reading of Section 106(c) also seems inconsistent with Sections 106(a) and 106(b) because those provisions are so narrowly crafted. Section 106(a) provides that a government agency "is deemed to have waived sovereign immunity with respect to any claim * * * that arose out of the same transaction or occurrence out of

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guide to what it meant in amending a provision in Title 28 in 1984 by adding "determine." The contrasting language of Sections 106(a) and 106(b) provides a much better guide to the meaning of Section 106(c) than does the language of 28 U.S.C. 157 (Supp. IV 1986). Cf. *United States* v. *Hohri*, 107 S.Ct. 2251 (1987).

[2] Like petitioner—and unlike the court of appeals below—neither the Seventh Circuit in *McVey Trucking* nor the Third Circuit in *Vazquez* focused on the language of Section 106(c)(2).

[3] Amicus Inslaw, unlike petitioner, has addressed (Br. 9-12) the court of appeals' reading of Section 106(c)(2). However, it offers no interpretation of the provision that would change the meaning of Section 106(c) if it ended following the first subsection. Inslaw further contends (Br. 7) that the court of appeals' construction of Section 106(c) gives no meaning to the phrase "notwithstanding any assertion of sovereign immunity." But that is not so. Government agencies would not be bound by any determinations of bankruptcy courts, and those courts would not be able to provide declaratory or injunctive relief against the government, in the absence of a waiver of sovereign immunity.

which such governmental unit's claim arose." It allows bankruptcy trustees to bring counterclaims that would be considered compulsory under Fed. R. Civ. P. 13(a) and to collect money judgments from the government on such claims. Section 106(b) authorizes an "offset against an allowed claim or interest of a governmental unit." It allows bankruptcy trustees to bring permissive counterclaims against the government, but authorizes setoff only, not affirmative recovery. Both provisions are applicable only when the government has filed a proof of claim in the bankruptcy court. H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 29-30 (1978). As the district court stated, "[t]he express waiver of sovereign immunity in the carefully limited circumstances provided for in subsections (a) and (b) would seem to preclude reading subsection (c) as a completely independent wide-open waiver of sovereign immunity which would permit suits against the state for retroactive money damages irrespective of whether the state had first brought suit against the estate" (Pet. App. A43-A44).

Indeed, since Section 542(b) authorizes bankruptcy trustees to bring contract actions against any "entity" (one of Section 106(c)(1)'s triggering terms), petitioner's interpretation of Section 106(c) would encompass most claims that would be brought against a sovereign by a bankruptcy trustee. Tort claims would not be authorized by Section 106(c), but they are much less common in bankruptcy cases than contract claims. In practice, therefore, petitioner's broad reading would largely swallow most of the rule established by Sections 106(a) and 106(b), which is that government agencies are subject to suit for money damages only when they have filed a proof of claim.[4]

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[4] In addition, the district court noted (Pet. App. A44) that Section 106(c) begins "[e]xcept as provided in subsections (a) and (b) of this

While the court of appeals interpreted Section 106(c) more narrowly than does petitioner, that provision still has substantial effect under the court of appeals' reading. For example, the statute makes clear that the bankruptcy court "may determine the amount or legality of any tax" under 11 U.S.C. 505 (1982 & Supp. IV 1986), even if a tax authority does not file a proof of claim.[5] In addition, Section 106(c) authorizes bankruptcy courts to discharge debts owed to government agencies by businesses seeking to reorganize under Chapter 11, whether or not the government files a proof of claim. 11 U.S.C. 1141 (1982 & Supp. IV 1986).[6] That is critically important since discharging debts is a primary goal of most businesses that seek to reorganize. In short, while Section 106(c) does not authorize bankruptcy courts to order government agencies to pay money to bankrutpcy trustees, the statute provides bankruptcy courts with significant powers to determine and limit what goverment agencies may obtain from estates that seek protection under the bankruptcy laws. Since by their nature estates in bankruptcy proceedings

section," and concluded that the clause "seem[s] calculated to prevent subsection (c) from exposing governments to liability for money judgments or set-offs beyond what has been accomplished in the excepted subsections." While the drafter could have chosen a more lucid manner of communicating that point, it seems likely that this is what the introductory clause means. Petitioner has offered no interpretation of Section 106(c)'s introductory clause.

[5] Section 505 (a)(2)(B) refers to "governmental unit," one of Section 106(c)(1)'s triggering terms.

[6] Section 1141(a) provides that the terms of a confirmed reorganization plan bind "any creditor," one of Section 106(c)(1)'s triggering terms. Section 1141(d)(1) further provides that "the confirmation of a plan—(A) discharges the debtor from any debt that arose before the date of such confirmation, * * * whether or not—(i) a proof of the claim based on such debt is filed."

have numerous debts, the power to adjudicate those matters is quite important.[7]

B. The Legislative History Confirms That Section 106(c) Does Not Waive Sovereign Immunity From Money Judgments

Five years before Congress enacted the Bankruptcy Code, the Commission on the Bankruptcy Laws of the United States issued a report recommending changes in the law that included the draft of a new Bankruptcy Act. The draft contained a provision stating that "[a]ll provisions of this Act shall apply to the United States and to every department, agency, and instrumentality thereof, and to every state and every subdivision thereof except where otherwise specifically provided." Sec. 1-104, App., *infra*, 1a. If that provision had been enacted, then government agencies would be subject to turnover actions under Section 542(b) and to actions to avoid preferences under Section 547(b), as petitioner contends. But that provision was not adopted. Congress instead enacted the much more guarded language of Section 106(c), which does not resem-

[7] Petitioner suggests (Pet. 24-25), relying on the Seventh Circuit's comments in *McVey Trucking* (812 F.2d at 328), that if government agencies are held to be immune from suits for money judgments unless they file a proof of claim, they will have a strong incentive to collect past due funds as rapidly as possible where a debtor may be heading into insolvency, which could lead other creditors to redouble their collection efforts and hasten a slide into bankruptcy. There is no merit to this contention. Every creditor has a strong incentive to collect past due funds from a debtor that appears to be insolvent. Payment now is always better than payment later, especially where a substantial dilution in payment is possible later on account of insolvency. Creditors have no way of knowing if and when a debtor will file for bankruptcy and cannot be certain that any money they collect would be disgorged later if the debtor files. In any event, the prospect of disgorgement in a bankruptcy proceeding would never preclude a rational creditor from pressing for immediate payment.

ble the language of the provision in the Commission's draft. That Congress legislated narrowly, after rejecting a broad waiver of sovereign immunity that had been proposed by the Commission, strongly supports the conclusion that Section 106(c) does not mean what petitioner says it means. " 'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' " *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987), quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-393 (1980) (Stewart, J., dissenting). If Congress had intended to adopt the rule that petitioner seeks to establish, it could have used the Commission's language, which contains no restrictions such as those in Section 106(c)(2).

Congress did not authorize money judgments against government agencies under Section 106, unless a government agency filed a proof of claim, for a simple reason: Congress thought that it lacked the power to subject unconsenting state agencies to liability for money judgments. As originally proposed in both the House and the Senate bills, Section 106 contained provisions similar to Sections 106(a) and 106(b) as enacted, but no provision comparable to Section 106(c). H.R. 8200, 95th Cong., 1st Sess. (1977); S. 2266, 95th Cong., 2d Sess. (1978); App., *infra*, 1a-2a. Both the House and the Senate reports explained that, while Congress may waive sovereign immunity completely for the federal government, "Congress does not, however, have the power to waive sovereign immunity completely with respect to claims of a bankrupt estate against a State." H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 29 (1978); App., *infra*, 2a.

Congress was plainly expressing the views that, while federal courts may provide prospective relief against state officials, Congress may not subject States to suits in federal courts for money damages in the absence of a waiver by the State (such as the filing of a proof of claim). See *Ex parte Young*, 209 U.S. 123 (1908) (federal courts may provide injunctive relief against state officials); *Oneida County* v. *Onedia Indian Nation*, 470 U.S. 226, 252 (1985) (leaving open whether Congress may abrogate Eleventh Amendment immunity when acting under its Article I powers); see generally *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 97-103 (1984); cf. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (Congress may abrogate Eleventh Amendment immunity when acting under the Fourteenth Amendment). Thus, Congress believed that it lacked the power to abrogate Eleventh Amendment immunity under the Bankruptcy Clause.[8] So believing—and there is no evidence that Congress ever changed its mind on this point—Congress plainly did not intend to subject unconsenting States to money judgments in federal bankruptcy courts.[9] Moreover, since Congress

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[8] "[I]n traditional eleventh amendment parlance, abrogation refers to the ability of Congress to create a cause of action for money damages enforceable by a citizen suit against a state in federal court." *United States* v. *Union Gas Co.*, 832 F.2d 1343, 1345 n.1 (3d Cir. 1987), cert. granted, No. 87-1241 (argued Oct. 31, 1988). "Abrogation" differs from "waiver" in Eleventh Amendment parlance. It is agreed that, if it gives the States sufficiently clear warning, Congress may deem a State to have waived its Eleventh Amendment immunity by participating in a federal program or taking some other affirmative step, such as filing a proof of claim in a bankruptcy court. See *Pennhurst*, 465 U.S. at 99.

[9] While Connecticut argues that Congress lacks the power to abrogate Eleventh Amendment immunity pursuant to its bankruptcy power, and petitioners argue to the contrary, we do not think the

treated federal and state agencies identically in Section 106(c), it did not intend to subject federal agencies to suits for money damages unless they file a proof of claim.

Congressional statements offered at the time Section 106(c) was proposed also show that the provision was not intended to have the broad meaning that petitioner contends it has. A brief explanatory comment on the provision was read on the floor of both the House and the Senate. 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini); App., *infra,* 4a. The statement did not suggest that Section 106(c) was broadly designed to enact the Bankruptcy Commission's proposal completely to waive sovereign immunity.[10] Rather, the statement explained that "Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir., 1975), and in re Dolard, 519 F.2d 282 (9th Cir., 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or

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Court needs to reach that issue, on which we express no opinion. Indeed, we think it would be inappropriate to decide whether Congress may abrogate Eleventh Amendment immunity pursuant to powers other than its Fourteenth Amendment authority where Congress has specifically disclaimed that it has authority to do so.

[10] The congressmen did note that section 106(c) was "included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective." 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini); App., *infra*, 4a. However, an express waiver was required so that government agencies would be bound by determinations made under provisions of the Code that Congress decided should apply to the government. In the absence of such a waiver, bankruptcy courts would be unable to provide declaratory or injunctive relief.

not the governmental unit to which such taxes are owed files a proof of claim."[11]

Thus, as its language provides, Section 106(c) waives sovereign immunity so that unconsenting government agencies, particularly tax authorities, are bound by determinations of bankruptcy courts and may not seek to obtain a greater recovery in a separate action. The legislative history provides, immediately following the sentence discussing *Gwilliam* and *Dolard*, that "subsection (c) is not limited to those issues, but permits the bankruptcy courts to bind governmental units on other matters as well." 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini); App., *infra,* 4a. By that, we think, the congressmen meant that Section 106(c) is not limited to tax issues, but provides that bankruptcy courts may determine other disputes as to how much a bankrupt estate owes a government agency, whether or not the agency files a proof of claim, and may discharge such debts. See pages 14-15, *supra*.

Certain statements in the floor comments, for example, that "section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit" (124 Cong. Rec. 32,394 (1978) (state-

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[11] In *Gwilliam*, the district court had concluded that "the Bankruptcy Court lacked jurisdiction to determine the dischargeability of the unpaid taxes as the Government has not waived sovereign immunity by statutue or otherwise expressly consented to the jurisdiction of the Bankruptcy Court" (519 F. 2d at 408). The court of appeals reversed, concluding that, under Section 2a(A) of the Bankruptcy Act, 11 U.S.C. 11(a)(2A) (1976), which provided that bankruptcy courts could determine "any question arising as to the amount or legality of any unpaid tax," bankruptcy courts could determine and discharge tax liability whether or not the Internal Revenue Service filled a proof of claim. *Dolard* extended *Gwilliam*'s rule to taxes accruing *after* bankruptcy proceedings concluded.

ment of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini); App., *infra,* 4a),[12] admittedly lend some support to petitioner's position. But we believe that these references to the avoidance provisions should be restricted to cases where the debtor has a possessory or ownership interest in property that a trustee seeks to include in the estate. Thus, if a debtor gave a creditor a preferential security interest in property that the debtor owns, the bankruptcy court could avoid that preference.

The action in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983), is of the sort that Section 106(c) authorizes under our construction of the statute. In that case, the Internal Revenue Service (IRS) seized a company's tangible property—its equipment, vehicles, inventory, and office supplies—to satisfy tax liabilities. As this Court's opinion stressed, the business retained ownership of the property, even though it was in the hands of the IRS (*id.* at 211). In those circumstances, the Court held, a bankruptcy court could order the IRS to turn the property over to the estate.[13] Similarly, we think that Section 106(c) authorizes bankruptcy courts to make binding determinations with respect to property that is in the possession of the estate. But we do not think that it authorizes bank-

[12] Similarly, Congressman Edwards' and Senator DeConcini's comments with respect to the preference provision state that "the Government is subject to avoidance of preferential transfers." 124 Cong. Rec. 32,400 (1978); *id.* at 34,000 (1978).

[13] The Court specifically noted that "if a tax levy or seizure transfers to the IRS ownership of the property seized," a bankruptcy court might not be able to order the IRS to return the property (462 U.S. at 209).

ruptcy courts to order government agencies to pay money to bankruptcy trustees.[14]

It is correct, as petitioner states (Br. 23-24), that it would be more convenient for bankruptcy trustees if they were able to bring all of their actions in bankruptcy court. Here, for example, rather than pursue the Willington Convalescent Home's administrative remedies or file a breach of contract action against Connecticut's Department of Health Services in state court, petitioner would prefer to pursue his turnover action in the bankruptcy court. But our interpretation of Section 106(c) would allow centralization in the most pressing class of cases—those involving competing claims to tangible property. Thus, if petitioner were seeking a declaration as to the ownership of real or personal property owned by the estate or in the possession of the estate, then, under our view, he could pursue his claim in the bankruptcy court. In any event, even if it would be more efficient for trustees to centralize all claims involving a bankrupt estate, Congress was clearly entitled to give greater weight to other values, such as the federal government's sovereign immunity to claims for monetary relief and the State's Eleventh Amendment im-

[14] Amicus Inslaw argues (Br. 20-21) that government agencies should be liable for money judgments under 11 U.S.C. 362(h) (Supp. IV 1986) if they violate the Bankruptcy Code's "automatic stay" provision, and claims (Br. 24) that it would be anomalous if such awards were not available. But it would seem that injunctive and declaratory relief would be perfectly adequate to remedy governmental violations of the automatic stay. Moreover, Section 362 applies to "entities" (one of Section 106(c)(1)'s triggering terms), and Section 362(h) authorizes awards of punitive damages. Thus, under Inslaw's (and petitioner's) interpretation of Section 106(c), the government would be liable for punitive damages under Section 362(h). That would be anomalous in light of Congress's unwillingness to authorize punitive damage awards under statutes such as the Federal Tort Claims Act (28 U.S.C. 2674).

munity, which, as noted, Congress believed it lacked power to abrogate.

C. Rules Of Statutory Construction Further Support The Conclusion That Section 106(c) Does Not Authorize Suits For Monetary Relief

Waivers of the federal government's sovereign immunity "cannot be implied but must be 'unequivocally expressed.' " *Army and Air Force Exchange Service* v. *Sheehan,* 456 U.S. 728, 734 (1982), quoting *United States* v. *Testan,* 424 U.S. 392, 399 (1976). Similarly, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242 (1985). It is clear that, to a limited extent, Section 106 waives the federal government's sovereign immunity and deems the States to have waived their Eleventh Amendment immunity.[15] But, we submit, except as provided in Sections 106(a) and 106(b), Congress has not "unequivocally expressed" its intention to waive the federal government's sovereign immunity from claims for monetary relief or deemed the States to have waived their immunity. Nor has it made its intention to abrogate the States' Eleventh Amendment immunity "unmistakably clear in the language of the statute." To the contrary, as the court of appeals concluded, the language of Section 106(c) is most reasonably read to preclude bankruptcy

[15] Under Section 106(a), government agencies are deemed to have waived their immunity with respect to compulsory counterclaims if they file a proof of claim; under Section 106(b), government agencies are liable for setoff with respect to permissive counterclaims if they file a proof of claim; and, under Section 106(c), government agencies are bound by certain determinations of bankruptcy courts whether or not they file a proof of claim.

courts from ordering government agencies to pay money to bankruptcy trustees. Any doubt as to the proper construction of Section 106(c) should be resolved in favor of the government, since waivers of sovereign immunity are to be "construed strictly in favor of the sovereign" (*McMahon* v. *United States,* 342 U.S. 25, 27 (1951)) and courts should not "enlarge its liability * * * beyond what the language requires" (*Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927)).[16]

This is not a case, such as those arising under the Federal Tort Claims Act, where Congress has waived the federal government's immunity from money damages, subject to certain exceptions, and the meaning of an exception is at issue. In such cases, this Court has concluded that the rule that waivers of sovereign immunity are to be strictly construed does not mandate that exceptions to waivers of sovereign immunity be broadly construed. *Kosak* v. *United States,* 465 U.S. 848, 853-854 n.9 (1984).[17] Rather, here the question is the extent of the waiver of the federal government's sovereign immunity and whether Congress has abrogated the States' Eleventh Amendment immunity at all.[18]

[16] As noted previously, Congress treated all "governmental units," both state and federal, identically in Section 106. Accordingly, we think it plain that the provision must be construed to have the same meaning with respect to both state and federal agencies.

[17] Similarly, this is not a case, like *Bowen* v. *Massachusetts*, No. 87-712 (June 29, 1988), where Congress has waived the federal government's immunity generally, and the meaning of the exception for suits seeking "money damages" is at issue.

[18] While Congress has made clear that the States are deemed to have waived their Eleventh Amendment immunity to the limited extent provided in Sections 106(a) and 106(b), and has further provided that state officials are bound by certain bankruptcy court determinations pursuant to Section 106(c), Congress has not made clear that it in-

This case is comparable to *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), a Title VII case. Congress made the federal government responsible for attorney's fees under Title VII "the same as a private person." 42 U.S.C. 2000e-5(k). But, while private parties may be required to pay interest on attorney's fee awards, the Court nevertheless held that the government may not be required to pay interest because, while waiving sovereign immunity, Congress had not "affirmately and separately" made clear that the government is liable for interest and the "no interest rule" requires a specific waiver (478 U.S. at 315). Freedom from awards of retroactive monetary relief are also at the heart of Eleventh Amendment immunity. *Edelman* v. *Jordan*, 415 U.S. 661, 666-668 (1974). Similarly, Congress has been especially careful in waiving the federal government's immunity from money damages, generally requiring plaintiffs to seek recovery for contract-type actions in the Claims Court, even though the Administrative Procedure Act (APA) generally authorizes suit against federal agencies where relief other than money damages is sought (5 U.S.C. 702).[19] Accordingly, as under the no interest rule, an affirmative and separate waiver should be required before government agencies are required to provide monetary relief. Because Congress did not make clear that bankruptcy courts may order govern-

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tended to abrogate the Eleventh Amendment immunity of an unconsenting State. Indeed, as noted previously, Congress apparently did not think that it could abrogate Eleventh Amendment immunity under the Bankruptcy Clause. H.R. Rep. No. 595 at 317; S. Rep. No. 989 at 29; App., *infra*, 2a.

[19] Petitioner's construction of Section 106(c) seems odd in that it confers greater jurisdiction with respect to claims against the government for money damages on bankruptcy courts, which are subordinate adjuncts of the district courts, than is generally conferred on the district courts.

ment agencies to pay money judgments, except pursuant to Section 106(a), Section 106(c) should not be broadly construed to authorize such awards.[20]

Another rule of statutory construction also supports that result. " 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' " *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring), quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Accord, *United States* v. *Security Industrial Bank*, 459 U.S. 70, 78 (1982); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500-501 (1979). This Court in *Onedia County* explicitly left open the question whether Congress may abrogate Eleventh Amendment immunity when acting under its Article I powers (470 U.S. at 252).[21] As the briefs on behalf

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[20] Although this Court has drawn a distinction between "money damages" and other forms of monetary relief for purposes of the APA's waiver of sovereign immunity for "relief other than money damages," *Bowen* v. *Massachusetts*, No. 87-712 (June 29, 1988), this case does not involve a statute that uses the term "money damages." Rather, this case involves a question of abrogation of a State's Eleventh Amendment immunity. In that context, the Court has not drawn a distinction between "money damages" and other forms of monetary relief, but has treated all retrospective monetary relief in federal courts as equally impermissible in the absence of an express waiver of immunity. See *Edelman* v. *Jordan*, 415 U.S. at 666, 668.

[21] Similarly, in *Welch* v. *Texas Department of Highways and Public Transportation*, No. 85-1716 (June 25, 1987), slip op. 6, the Court "assume[d], without deciding or intimating a view on the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment." The Court could decide the issue in No. 87-1241, *Commonwealth of Pennsylvania* v. *Union Gas Co.* (argued Oct. 31, 1988).

of petitioner and the State of Connecticut illustrate, that is not an easy question to resolve. See also *McVey Trucking*, 812 F.2d at 314-323. A construction of the statute is "fairly possible by which the question may be avoided": Section 106(c) may be construed not to authorize monetary awards. That is the construction which should therefore be adopted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
TRACY J. WHITAKER
Attorney

MARCH 1989

APPENDIX

A. The Draft Bankruptcy Act appended to the 1973 Report of the Commission on the Bankruptcy Laws of the United States included the following provision and note, *reprinted in* App. 2 L. King, R. Levin & K. Klee, *Collier on Bankruptcy* Pt. 1 (15th ed. 1988):

> *Section 1-104. Applicability of Act to United States, States, and Subdivisions.* All provisions of this Act shall apply to the United States and to every department, agency, and instrumentality thereof, and to every state and every subdivision thereof except where otherwise specifically provided. This section does not render any branch or unit of the government eligible for relief as a petitioner except as provided in Chapter VIII, or subject to relief as a debtor upon an involuntary petition.

NOTE

This section, with the exceptions indicated, answers the question whether all of the provisions of this Act are intended to apply to federal and state governments and to all subdivisions and instrumentalities thereof.

B. The bills to amend the Bankruptcy Act, H.R. 8200, 95th Cong., 1st Sess. (1977), and S. 2266, 95th Cong., 2d Sess. (1978), *reprinted in* App. 3 L. King, R. Levin & K. Klee, *Collier on Bankruptcy*, Pt. 3 at 324 & pt. 7 at 313 (15th ed. 1988), as introduced, contained the following provision:

> § 106. *Waiver of sovereign immunity*
>
> (a) A governmental unit that files a proof of claim under section 501 of this title is deemed to have waived sovereign immunity with respect to any claim

against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit for which such governmental unit filed a proof of claim or interest under section 501 of this title any claim against such governmental unit that is property of the estate.

C. The congressional reports, H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977), and S. Rep. No. 989, 95th Cong., 2d Sess. 29-30 (1978), *reprinted in* App. 2 L. King, R. Levin & K. Klee, *Collier on Bankruptcy* Pt. 2 at 317 and App. 3, Pt. 5 at 29-30 (15th ed. 1988), contained the following comments on the version of Section 106 contained in H.R. 8200 and S. 2266:

§ 106. *Waiver of sovereign immunity*

Section 106 provides for a limited waiver of sovereign immunity in bankruptcy cases. Though Congress has the power to waive sovereign immunity for the Federal government completely in bankruptcy cases, the policy followed here is designed to achieve approximately the same result that would prevail outside of bankruptcy. Congress does not, however, have the power to waive sovereign immunity completely with respect to claims of a bankrupt estate against a State, though it may exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy.

There is, however, a limited change in the result from the result that would prevail in the absence of bankruptcy; the change is two-fold and is within Congress' power vis-a-vis both the Federal Government

and the States. First, the filing of a proof of claim against the estate by a governmental unit is a waiver by that governmental unit of sovereign immunity with respect to compulsory counterclaims, as defined in the Federal Rules of Civil Procedure, that is, counterclaims arising out of the same transaction or occurrence. The governmental unit cannot receive distribution from the estate without subjecting itself to any liability it ha to the estate within the confines of a compulsory counterclaim rule. Any other result would be one-sided. The counterclaim by the estate against the governmental unit is without limit.

Second, the estate may offset against the allowed claim of a governmental unit, up to the amount of the governmental unit's claim, any claim that the debtor, and thus the estate, has against the governmental unit, without regard to whether the estate's claim arose out of the same transaction or occurrence as the government's claim. Under this provision, the setoff permitted is only to the extent of the governmental unit's claim. No affirmative recovery is permitted. Subsection (a) governs affirmative recovery.

Though this subsection creates a partial waiver of immunity when the governmental unit files a proof of claim, it does not waive immunity if the debtor or trustee, and not the governmental unit, files proof of a governmental unit's claim under proposed 11 U.S.C. 501(c).

This section does not confer sovereign immunity on any governmental unit that does not already have immunity. It simply recognizes any immunity that exists and prescribes the proper treatment of claims by and against that sovereign.

D. Senator DeConcini (124 Cong. Rec. 33,993 (1978)), and Representative Edwards (*id.* at 32,394) read the following comments concerning the final version of Section 106, *reprinted in* App. 3 L. King, R. Levin & K. Klee, *Collier on Bankruptcy*, Pt. 9 at IX-90 and Pt. 10 at X-16 (15th ed. 1988):

> Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in title II applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir., 1975), and in re Dolard, 519 F.2d 282 (9th Cir., 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in sections 106(a) and (b), subsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby overruled.

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AMICUS CURIAE

BRIEF

No. 88-412

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MARTIN W. HOFFMAN, TRUSTEE,
Petitioner,

v.

CONNECTICUT DEPARTMENT
OF INCOME MAINTENANCE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR INSLAW, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MICHAEL E. FRIEDLANDER
Counsel of Record
CHARLES R. WORK
JACQUELINE E. ZINS
SETH D. GREENSTEIN
McDERMOTT, WILL & EMERY
1850 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-8000
Counsel for INSLAW, Inc.

February 23, 1989

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---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 36.3 of the Rules of this Court, INSLAW, Inc. (hereinafter "INSLAW") respectfully moves for leave to file the attached brief as amicus curiae in support of reversal of the judgment of the United States Court of Appeals for the Second Circuit. Petitioner and Intervenor United States of America have consented to the filing of this brief; Respondents have not.

This case raises important questions concerning the scope and meaning of the statutory waiver of sovereign immunity expressed in the Bankruptcy Code, 11 U.S.C.

§ 106 (1988) (hereinafter "§ 106"), and its applicability to the states under the eleventh amendment. As set forth below, INSLAW respectfully requests leave to file the attached brief amicus curiae to address issues and offer perspectives on the questions presented that will not be addressed by the Petitioner and that may assist the Court in its determination of the merits of this case.

First, Petitioner has an interest in this case only with respect to the narrower issue involving state sovereign immunity from suit for money damages in federal courts. Accordingly, Petitioner has limited his Questions Presented for Review specifically to that issue. While INSLAW submits that this Court can decide this case on the basis of this narrower issue, Intervenor United States argues that the question should be decided as a matter of statutory construction as to all sovereigns, without reference to the eleventh amendment. Brief of United States on Petition for a Writ of Certiorari at 11-12. Because Petitioner will address the arguments of the United States only in the context of state sovereign immunity, INSLAW requests leave to file the attached brief amicus curiae so that, to the extent this Court may reach the contentions of the United States, this Court will receive an opposing viewpoint.

Second, the brief of the Petitioner analyzes the express waiver of sovereign immunity in the Bankruptcy Code solely in the context of the particular Code sections directly involved in the decisions below. Yet § 106(c), by its terms, expressly implicates all sections of the Bankruptcy Code that contain at least one of the three trigger words, "creditor," "entity" or "governmental unit." The language and legislative history of these triggered sections, including the fundamental remedy of the automatic stay, 11 U.S.C. § 362, further demonstrates that Congress did not intend to narrowly circumscribe the express waiver of sovereign immunity under § 106(c). INSLAW therefore additionally requests leave to file the attached amicus curiae brief to discuss the interaction of these other related Bankruptcy Code sections with § 106(c) and their impact upon the questions presented.

Finally, the interpretation given by this Court to § 106(c) may directly affect INSLAW. INSLAW, formerly a debtor-in-possession under chapter 11 of the Bankruptcy Code, filed an adversary proceeding against the United States and the United States Department of Justice alleging violations of the automatic stay, 11 U.S.C. § 362(a)(3). The bankruptcy court denied the government's motion to dismiss for want of jurisdiction and held that Congress had expressly waived federal sovereign immunity under § 106(c). *In re INSLAW, Inc.*, 76 Bankr. 224 (Bankr. D.D.C. 1987). On the merits, the bankruptcy court subsequently awarded declaratory and injunctive relief, and monetary damages against the government. *In re INSLAW, Inc.*, 83 Bankr. 89 (Bankr. D.D.C. 1988). On appeal, the government is challenging the bankruptcy court's jurisdiction under § 106(c) on the basis of the rationale adopted by the United States Court of Appeals for the Second Circuit in the decision hereinbelow. Inasmuch as the decision to be rendered by this Court may substantially affect the rights of INSLAW and others similarly situated to invoke the protections of the Bankruptcy Code against the federal government, INSLAW requests leave to file the attached amicus curiae brief.

WHEREFORE, INSLAW respectfully requests that this Honorable Court grant this Motion for Leave to File the atached Brief as Amicus Curiae in Support of Petitioner.

Respectfully submitted,

MICHAEL E. FRIEDLANDER
Counsel of Record
CHARLES R. WORK
JACQUELINE E. ZINS
SETH D. GREENSTEIN
McDERMOTT, WILL & EMERY
1850 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-8000
Counsel for INSLAW, Inc.

February 23, 1989

QUESTION PRESENTED

Whether the express involuntary waiver of sovereign immunity under the Bankruptcy Code, 11 U.S.C. § 106(c), applies to actions for money judgments?

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR INSLAW, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

INSLAW, Inc. (hereinafter "INSLAW") respectfully submits this brief amicus curiae in support of reversal of the judgment of the United States Court of Appeals for the Second Circuit.

INTEREST OF THE AMICUS CURIAE

INSLAW has a substantial interest in the decision to be rendered by this Honorable Court as to the scope and interpretation of the express waiver of sovereign immunity

under the Bankruptcy Code, 11 U.S.C. § 106(c) (1988) (hereinafter "§ 106(c)").

INSLAW, formerly a debtor-in-possession under chapter 11 of the Bankruptcy Code, prevailed in an adversary proceeding against the United States and the Department of Justice alleging violations of the automatic stay, 11 U.S.C. § 362(a)(3), and obtained declaratory and injunctive relief and money damages. *In re INSLAW, Inc.*, 83 Bankr. 89 (Bankr. D.D.C. 1988). While conceding that § 106(c) operated as an express waiver of sovereign immunity for purposes of awarding declaratory and injunctive relief, the government denied jurisdiction of the bankruptcy court to award a monetary judgment against the United States, claiming that its refusal to file a formal written proof of claim preserved its sovereign immunity from money damages. The government has appealed the bankruptcy court's finding of jurisdiction under § 106(c), relying primarily on the rationale adopted by the United States Court of Appeals for the Second Circuit in the decision hereinbelow.

The Court of Appeals held that the language of § 106(c) was insufficient to waive the sovereign immunity of a state governmental unit to money damages under the strict requirements of the eleventh amendment. *In re Willington Convalescent Home, Inc.*, 850 F.2d 50 (2d Cir. 1988) (hereinafter "*Willington*"). However, Intervenor United States contends in its Brief on Petition for a Writ of Certiorari that the questions presented should not be resolved under the Bankruptcy Clause of the United States Constitution, art. I, § 8, or under the eleventh amendment. Brief of United States at 11-12. Rather, the United States asserts that the scope of the waiver of sovereign immunity under § 106(c) should be addressed solely as a matter of statutory interpretation, which would apply equally to the federal government. *Id.*

If this Court accepts the rationale of the Intervenor and does not limit its ruling to the question of state sovereign immunity addressed by the Court of Appeals, the Court's decision could substantially affect the pending appeal of *In re INSLAW, Inc.* Thus, INSLAW has a strong interest in this proceeding.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Second Circuit erroneously interpreted the language of the express waiver of sovereign immunity under the Bankruptcy Code, 11 U.S.C. § 106(c), to exclude money judgments against a governmental unit. *Willington*, 850 F.2d 50.

The Court of Appeals reached this erroneous conclusion because it ignored the express language of § 106(c) that the waiver shall apply "notwithstanding *any* assertion of sovereign immunity." (Emphasis added.) This unequivocal language mandates that § 106(c) waives *all* claims of sovereign immunity and subjects all governmental units to suit for both equitable and monetary relief under certain triggered sections of the Code.

Congress carefully chose the trigger words "creditor," "entity" and "governmental unit," so as to grant bankruptcy courts jurisdiction over sovereigns to the same extent as other creditors and entities under the Code. This intention is completely consistent with the policies underlying the remaining statutory sections, which subject governmental units, with explicit limited exceptions, to the orderly system of equitable distribution set forth in the Code.

The Court of Appeals further erred by reading artificial restrictions into the clear language of § 106(c)(2). Specifically, the term "determinations" in § 106(c) was not intended to be limited only to determinations of the government's rights in the debtor's estate, as the Court

of Appeals held. To the contrary, Congress used the term "determinations" to subject governmental units to the jurisdiction of a bankruptcy court to "hear *and determine*" all cases and core proceedings under title 11, including the award of money judgments. 28 U.S.C. § 157(b) (emphasis added). To read § 106(c) otherwise would grant the debtor a right without a remedy.

Moreover, the legislative history demonstrates no intent to restrict the scope of the § 106(c) waiver solely to injunctive and declaratory relief. Rather, the legislative history shows Congress' intent to satisfy the case law requirement that a statute waiving sovereign immunity must expressly refer to the sovereign. Congress chose to satisfy this requirement in § 106(c) by providing that every section using one of the trigger words expressly applies to all governmental units, without limitation.

Congress' intent under § 106(c) to waive sovereign immunity as to money damages is further found in the triggered sections themselves. Those specific statutes permitting money recovery are fundamental exercises of the bankruptcy power, over which the Constitution has granted Congress supreme and exclusive authority. Art. I, § 8, cl. 4. By exempting sovereigns from the reach of these fundamental powers, the Court of Appeals invites results that are completely inconsistent with the salutary policies underlying the Bankruptcy Code. Because Congress intended the waiver of sovereign immunity under § 106(c) to promote the purposes of the Code and not to defeat them, Congress also must have intended that § 106(c) waive sovereign immunity to money judgments.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 106(C) EXPRESSLY WAIVES SOVEREIGN IMMUNITY UNDER EACH BANKRUPTCY CODE PROVISION CONTAINING ANY OF THE THREE TRIGGER WORDS.

The questions presented concern the meaning and extent of the express statutory waiver of sovereign immunity under the Bankruptcy Code, 11 U.S.C. § 106(c). The starting point for interpreting a statute is the language itself. *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). But, as this Court more recently noted, "the text is only the starting point. . . . 'In expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (citations omitted). The legislative history should also be thoroughly considered. *Flora v. United States*, 357 U.S. 63, 65 (1958), *aff'd after reh'g*, 362 U.S. 145, *reh'g denied*, 362 U.S. 972 (1960).

This Court long has recognized that interpretation of statutes waiving sovereign immunity requires a balancing of two equally strong principles. While such statutes must be strictly construed, *United States v. Michel*, 282 U.S. 656 (1931), they also must be interpreted to give full effect to the policies intended by Congress. Courts should not "import immunity into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). *See also Canadian Aviator Ltd. v. United States*, 324 U.S. 215, 222 (1945) ("we think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation").

Although the decision of the Court of Appeals acknowledged these standards of statutory interpretation, it failed to correctly implement them. First, while focusing its analysis on the terms "determination" and "issue" found

in § 106(c)(2), the Court of Appeals ignored and failed to apply the broader directive in the opening passage of § 106(c) that the triggered remedies apply "notwithstanding *any* assertion of sovereign immunity." (Emphasis added.)

Second, although the Court of Appeals read § 106(c)(2) in the context of subsections (a) and (b) thereof, it failed to interpret that section in light of the express language and purpose of the Code sections incorporated by reference into § 106(c). Rather than restrict its analysis to a few words in a single sentence of the statutory section under review, the Court of Appeals should have read § 106(c) in light of those sections of the Bankruptcy Code containing at least one of the trigger words, as well as in conjunction with the broad scope of jurisdiction otherwise granted by Congress to the bankruptcy courts. Further, the Court of Appeals should have interpreted § 106(c) to promote, rather than defeat, the essential policies underlying the Bankruptcy Code. Had the Court of Appeals done so, it would not have erroneously excluded monetary relief from the scope of the waiver under § 106(c).

A. The Triggered Sections Apply "Notwithstanding Any Assertion of Sovereign Immunity."

It is clear on the face of § 106(c) that Congress intended to waive *any* claim of sovereign immunity for all governmental units under any section of the Code containing one of the three trigger words.[1]

---

[1] In relevant part, section 106 provides:

> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

In interpreting the scope of this waiver,[2] the Court of Appeals neglected to attribute any meaning to the phrase "notwithstanding any assertion of sovereign immunity"; indeed, it erroneously interpreted the statute as if this critical language did not exist. The plain language of "notwithstanding *any* assertion of sovereign immunity" means that a governmental unit cannot assert *any* type of sovereign immunity from damages or declaratory or injunctive relief where the conditions of § 106(c)(1) are met. The legislative history is in full accord with this interpretation, stating simply that, "The provision indicates that the use of the term 'creditor,' 'entity,' or 'governmental unit' in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units." 124 Cong. Rec. H32350, 32394 (Sept. 28, 1978); S33989, 33993 (Oct. 5, 1978). The use of "any" in both the language of the statute and the legislative history makes unmistakably clear Congress' intention that *no* claim of sovereign immunity will bar the applicability of the referenced sections to the sovereign.[3]

---

[2] The Court of Appeals correctly noted that the phrase, "Except as provided in subsections (a) and (b) of this section," distinguishes subsection (c) from subsections (a) and (b). *Willington*, 850 F.2d at 54. Subsections (a) and (b) permit the debtor to raise counterclaims and set-offs, respectively, under any legal theory, where the sovereign voluntarily asserts a claim against the estate. Subsection (c) provides an involuntary waiver of sovereign immunity under any provision of the Bankruptcy Code that contains at least one of the three trigger words.

[3] It is significant that the clear majority of courts interpreting the plain language of § 106(c) have concluded that Congress intended to waive "any" assertion of sovereign immunity under any section containing the trigger words listed in § 106(c)(1). *See, e.g., WJM, Inc. v. Massachusetts Dep't of Public Welfare*, 840 F.2d 996, 1001 (1st Cir. 1988); *Matter of McVey Trucking, Inc.*, 812 F.2d 311, 326-27 (7th Cir. 1987); *Tew v. Arizona State Retirement System*, 78 Bankr. 328, 329-30 (S.D. Fla. 1987); *In re Rhode Island Ambulance Services, Inc.*, 92 Bankr. 4, 6-7 (Bankr. D.R.I. 1988); *In re R & L Refunds*, 45 Bankr. 733, 735 (Bankr. W.D. Ky.

B. Congress Crafted Section 106(c)(1) to Promote the Policies Underlying the Bankruptcy Code.

Essential to an understanding of § 106(c) is its role in achieving the policies underlying the bankruptcy laws. The Code establishes a system of equitable distribution or payment to creditors of the debtor's assets or debts, respectively, according to a system of priorities established by the Code. *See, e.g., Reading Co. v. Brown*, 391 U.S. 471 (1968); *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959). Further, Congress intended that each debtor should enter bankruptcy with a "breathing spell from his creditors," H.R. Rep. No. 595, 95th Cong., 1st Sess. 340, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6296; S. Rep. No. 989, 95th Cong., 2d Sess. 49, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5835, and emerge from bankruptcy with a fresh start, "unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *see also Perez v. Campbell*, 402 U.S. 637, 648 (1971). Obviously, if a governmental unit were permitted to exercise superior control over the property of a debtor, or to attempt collection of debts otherwise discharged under the Code, the debtor would be in no better position during or after bankruptcy than before. Further, exemption of governmental units from all forms of monetary relief under the Code necessarily would subvert the carefully crafted scheme of equitable distribution for the benefit of *all* creditors. Instead, Congress enacted a complete, involuntary waiver of sovereign immunity under § 106(c) to promote and implement the broad salutary purposes of the Bankruptcy Reform Act of 1978.

Indeed, even the choice of the three § 106(c)(1) trigger words reflects the fundamental policies of the Bank-

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1985); *In re Davis*, 20 Bankr. 519, 522 (Bankr. M.D. Ga. 1982). *See also In re Nevear*, 674 F.2d 1201 (7th Cir. 1982); *In re Shelby County Healthcare Services, Inc.*, 80 Bankr. 555 (Bankr. N.D. Ga. 1987).

ruptcy Code. Had Congress intended that a governmental unit be granted a preferred standing with respect to the debtor or to other parties, § 106(c) could have made the waiver applicable only to sections including the term "governmental unit." However, Congress went much further. By choosing "creditor," Congress indicated that a governmental unit is to stand in the same position as any other creditor with respect to its pre-petition claims against the estate, except as may otherwise be provided in the Code. *See* H.R. Rep. No. 595, 1978 U.S. Code Cong. & Admin. News at 6266-67; S. Rep. No. 989, 1978 U.S. Code Cong. & Admin. News at 5808-09. By applying to a governmental unit the Code sections incorporating the broad term "entity," and by defining "entity" to include a governmental unit, Congress established that the government generally will be treated under the Code the same as everyone else even where the government has no pre-petition claim against the estate. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 209 (1983). In short, had Congress generally wished to create a "supercreditor" status for governmental units, it easily could have done so; instead, it did just the opposite.

Thus, Congress chose to waive any and all sovereign immunity under the triggered sections to further the purposes and policies of the Bankrupcy Code. Conversely, the interpretation given to § 106(c) by the Court of Appeals leads to anomalous results that would completely defeat the salutary purposes of the Code, as shown, *infra*, at III, p. 24.

C. A "Determination" Under the Bankruptcy Code Includes Monetary Damages and Is Not Limited to Declaratory and Injunctive Relief.

Despite the plain language of § 106(c), the Court of Appeals limited the scope of that section by interpreting the term "determination," as found in § 106(c)(2), to mean only a determination of the sovereign's rights in

the debtor's estate, to the exclusion of the bankruptcy court's power also to determine the debtor's rights in any property of the estate being wrongfully withheld by a governmental unit. *Willington*, 850 F.2d at 55. This interpretation contradicts the plain language of § 106(c) and results from the failure of the Court of Appeals to read "determination" within the context of the entire Code. As shown below, Congress utilized the term "determination" not to limit the scope of the waiver, but to enable the bankruptcy court to bind a sovereign on *all* matters within the purview of the triggered sections.

Congress consistently has used the term "determination" to mean any order of a bankruptcy court. The initial proposed grant of jurisdiction to the bankruptcy courts would have extended "to the *determination of all controversies* that arise out of a case commenced under this Act, ..." H.R. 31, § 2-201(a), 94th Cong., 1st Sess. (1975) (emphasis added). *See also* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess. 1, 85, 88 (1973); 1 *Collier Bankruptcy Manual* ¶ 1.03 at 1-15 (3d Ed. 1988).[4] The more limited jurisdictional grant under the Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 157, now provides:

> (b)(1) Bankruptcy judges may hear *and determine* all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, *and may enter appropriate orders and judgments*, subject to review under section 158 of this title.

(Emphasis added.) Thus, Congress consistently has used the term "determination" to be coextensive with the bankruptcy court's jurisdiction, thereby allowing the bank-

[4] The jurisdictional provisions of the Bankruptcy Reform Act of 1978, later declared unconstitutional in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), did not use the term "determine" in any sense.

ruptcy court to bind the sovereign as to *any* matters with "appropriate orders and judgments." There simply is nothing in the legislative history to suggest an intent to limit the nature or scope of the "appropriate orders and judgments." Indeed, the legislative history of § 106(c) confirms that "determination by the court of an issue" should be read as "an order of the court [that] binds governmental units." 124 Cong. Rec. at H32394; S33993. *See also In re R & L Refunds*, 45 Bankr. at 735. Applying the Court of Appeals' definition of "determination" to 28 U.S.C. § 157, a bankruptcy court would never be empowered to avoid preferences, recover money or assess damages against *any* person—an absurd result.

Similarly, there is no reason to interpret the terms "issue" and "binds" as restricting a bankruptcy court from entering money judgments against a governmental unit. "Issues" can be issues of fact as well as questions of law, and can refer to factual issues regarding the appropriate amount of money damages.[5] "Binds," in the context of an involuntary waiver of immunity over an unconsenting sovereign, reinforces the principle that the decision of the bankruptcy court will control, even if the sovereign refuses to subject itself voluntarily to the jurisdiction of the bankruptcy court.

Hence, a reading of § 106(c)(2) in the context of the entire Bankruptcy Code and the powers granted to the bankruptcy court confirms Congress' intention: to ex-

[5] *See, e.g., Burke v. Bevona*, Nos. 88-7124, 88-7136 (2d Cir. January 18, 1989) 1989 WL 3966, 1989 U.S. App. LEXIS 610; *Filmline (Cross-Country) Productions, Inc. v. United Artists Corp.*, No. 87-7647 (2d Cir. January 12, 1989) 1989 WL 1901, 1989 U.S. App. LEXIS 382; *Bell v. A-Leet Leasing Corp.*, 863 F.2d 257, 259 (2d Cir. 1988); *FMC Corp. v. S.S. Majorie Lykes*, 851 F.2d 78, 79 (2d Cir. 1988); *Oliveri v. Delta Steamship Lines, Inc.*, 849 F.2d 742, 743 (2d Cir. 1988).

tend the scope of the statutory waiver by the use of broad terms such as "determination" and "issue."[6]

D. The Legislative History of Section 106 Demonstrates That It Was Intended Without Limitation to Comply With the Requirement of an Express Waiver of Sovereign Immunity.

The Court of Appeals' view that § 106(c) does not expressly waive sovereign immunity as to money damages also is undermined by the relevant legislative history. In fact, Congress was careful to describe in plain language the breadth of the intended waiver: "The provision indicates that the use of the term 'creditor,' 'entity,' or 'governmental unit' in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units." 124 Cong. Rec. at H32394; S33993. Congress further explained that its purpose in enacting § 106(c) was "to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective." *Id.*

The legislative history notes that § 106(c) "codifies *In re Gwilliam*, 519 F.2d 407 (9th Cir. 1975), and *In re Dolard*, 519 F.2d 282 (9th Cir. 1975)," two then-recent cases concerning jurisdiction over the United States Internal Revenue Service in the bankruptcy courts. In each of those cases, the government contended, and the

[6] Further evidence of the intended broad scope of the waiver can be found from the enumerated types of "core proceedings" under 28 U.S.C. § 157(b)(2), which includes turnover proceedings, § 157(b)(2)(E); proceedings to avoid preferences, § 157(b)(2)(F); dischargeability of debts, § 157(b)(2)(I); and any matters affecting the administration of the estate, § 157(b)(2)(A), such as violations of the automatic stay, *Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289 (4th Cir. 1986). A "determination" under any of these sections can result in a money judgment.

lower courts found, that there could be no involuntary waiver of sovereign immunity where the relevant statutes did not expressly refer to the sovereign. *Gwilliam*, 519 F.2d at 408-09; *Dolard*, 519 F.2d at 284. The Ninth Circuit held that the government's refusal to file a proof of claim did not impair the bankruptcy court's jurisdiction to hear and determine the amount of unpaid taxes accruing either before or after the bankruptcy petition was filed, since it would distort the intention of the bankruptcy statutes if the court's jurisdiction could be exercised, in effect, only at the option of the IRS. *Gwilliam*, 519 F.2d at 410-11; *Dolard*, 519 F.2d at 286.

The Court of Appeals relied on the legislative history concerning *Gwilliam* and *Dolard* as evidence that the § 106(c) waiver should be limited to determinations of the government's rights in the bankrupt's estate. *Willington*, 850 F.2d at 55-56. For three fundamental reasons, the Court of Appeals' interpretation of this legislative history is erroneous.

First, the broad language of § 106(c) demonstrates that Congress intended to codify a more expansive principle than just the fact-specific holdings of *Gwilliam* and *Dolard*. Congress could have enacted only a narrow waiver to discharge tax liability or to allow only a determination of the government's rights in the debtor's estate. Instead, Congress chose to enact a broad waiver comprehending situations under the new Bankruptcy Code beyond *Gwilliam* and *Dolard*. Consistent with that view, the legislative history of § 106(c) specifically notes that "subsection (c) is not limited to those issues [adjudicated in those two cases], but permits the bankruptcy court to bind governmental units on other matters as well." 124 Cong. Rec. at H32394; S33993.

The Court of Appeals' misunderstanding of Congress' reference to *Gwilliam* and *Dolard* is in part a function of its failure to view the legislative history in a his-

torical context. Before 1978, the Code had no express waiver of sovereign immunity. As a result, judicial debate focused on the need for an explicit waiver in the statute itself. As originally proposed in 1977, the new Code only provided for voluntary waivers of sovereign immunity under § 106(a) and (b), without any explicit provision for involuntary waiver by statute. The proposed code was potentially ambiguous as to involuntary waivers of sovereign immunity, insofar as numerous sections contained words that were defined to include the sovereign. *See* § 101(9), (14) and (26); *United States v. Whiting Pools, Inc.*, 462 U.S. at 209. Therefore, in 1978, to overcome the government's contentions in *Gwilliam* and *Dolard* that an involuntary waiver of sovereign immunity could only be imputed where the subject statutory provisions specifically refer to the sovereign, Congress declared in § 106(c) that every section including one of the trigger words makes explicit reference to a governmental unit and thereby unequivocally waives sovereign immunity thereunder. Viewed in this historical context, it is clear that this broader principle from *Gwilliam* and *Dolard* was codified by Congress, and not the confined point of law relied upon by the Court of Appeals.

Second, the Court of Appeals erroneously relies upon the appearance of the term "determine" in the legislative history as support for its narrow interpretation of "determination." *Willington*, 850 F.2d at 54-56. The legislative history notes that *Gwilliam* and *Dolard* "permitt[ed] the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor . . . ." 124 Cong. Rec. at H32394; S33993. In conjunction with the statement that "section 106(c) permits a trustee or a debtor in possession to assert avoiding powers under title 11 against a governmental unit,"

id., the Court of Appeals incorrectly concluded that Congress intended "determinations" in § 106(c)(2) to apply only to determinations of the government's interests in the estate. *Willington*, 850 F.2d at 55-56.

The Court of Appeals erred in this conclusion by again failing to view the term "determine" in the broader context of jurisdiction over the government under the Bankruptcy Act. *See* I-C, *supra* at 9-11. The statute at issue in *Gwilliam* and *Dolard*, section 11(a)(2A) of the 1966 amendments to the Bankruptcy Act, invested the bankruptcy courts with jurisdiction to "[h]ear and determine, or cause to be heard and determined, any question arising as to the amount or legality of any unpaid tax . . . ." 11 U.S.C. § 11(a)(2A) (1966). That same language, "hear and determine," now appears in 28 U.S.C. § 157(b) as to all matters, and specifically grants bankruptcy court jurisdiction to enter money judgments. *See* I-C, *supra* at 10-11. Thus, the legislative history did not intend to limit the type of determination subject to waiver; it was intended to waive sovereign immunity for all triggered actions, coextensive with the jurisdiction of the bankruptcy court. Stated another way, § 106(c) not only permits a bankruptcy court to determine the government's rights in the debtor's property, it reciprocally permits the bankruptcy court to adjudicate the debtor's rights against a governmental unit in any property of the estate.

Third, the legislative history of § 106 specifically indicates that it applies to the kind of actions that the Court of Appeals would exclude from its reach. The legislative history states, "section 106(c) permits a trustee or a debtor in possession to assert avoiding powers under title 11 against a governmental unit; . . . ." 124 Cong. Rec. at H32394; S33993. Concurrently, the legislative history of § 547(b), governing avoidance of preferential transfers, notes that the result of § 106(c) is "that the Government is subject to avoidance of preferential trans-

fers."[7] 124 Cong. Rec. at H32394; S33993. Thus, the decision in *Willington* that sovereign immunity was not waived by Congress as to actions under § 547 is contradicted by the legislative history of § 106(c).

II. THE TYPE OF REMEDY AVAILABLE AGAINST A SOVEREIGN IS DETERMINED BY THE TRIGGERED SECTIONS THEMSELVES AND NOT BY ANY LIMITATION IN SECTION 106(C)(2).

An examination of the Bankruptcy Code sections containing the requisite trigger word also demonstrates that Congress intended a broad waiver of sovereign immunity under § 106(c). By analyzing these applicable sections, it is clear that the nature of the remedy available to the bankruptcy court under these sections is determined by the provisions of the triggered sections themselves, and not by the provisions of § 106(c)(2).

More particularly, each of the triggered sections applies to a sovereign in exactly the same way, *i.e.*, by including in its language one of the three § 106(c) trigger words. Yet, these sections do not all provide for the same type of remedies. Indeed, many of the sections grant rights to the sovereign and provide no remedies at all to the debtor. Other sections clearly provide remedies against the sovereign, but the scope of those remedies is defined by the particular section at issue. Some of these triggered sections, by definition, provide only for declaratory and injunctive relief, while others expressly contemplate monetary relief as well. It is therefore unreasonable to conclude, as did the Court of Appeals, that § 106(c)(2), rather than the operative triggered section, determines the type of relief available against an unconsenting sovereign. The force of this reasoning is all the more apparent when examining the specific statutes falling within the categories described above.

[7] The Court of Appeals concedes that this legislative history raises questions about Congressional intent, but curiously dismisses the passage because it believed Congress had not made its intention to waive state sovereign immunity unmistakably clear in the language of the statute. 850 F.2d at 57. This conclusion completely contradicts the Court of Appeals' heavy reliance on other phrases of the same legislative history, and appears to be an attempt to rationalize language inconsistent with its erroneous interpretation of § 106(c).

The first of these categories includes those sections that imbue the sovereign with the rights and benefits accorded to all other "creditors" and "entities."[8] Sovereign immunity is not implicated under these sections because they provide no rights to the debtor against a sovereign.

The second category comprises those sections providing relief in favor of the debtor, but expressly limiting that relief to declaratory or injunctive relief.[9] It is

[8] *See, e.g.*, 11 U.S.C. § 303(b) (permitting the filing of an involuntary case by three or more "entities"); §§ 341 and 343 (requiring a meeting of "creditors" and permitting "creditors" to examine the debtors); § 361 (relating to adequate protection for property interests of an "entity"); § 363 (precluding use, lease or sale of cash collateral assets absent consent of each interested "entity"); §§ 501 and 502 (concerning filing and allowance of proofs of claim or interests of "creditors"); § 506 (granting secured status to lien "creditors"); § 553 (rights of set-off by creditors); § 1109 (providing a "creditor" the right to be heard on any issue in a case); and, § 1121 (allowing any "creditor" the right to file a reorganization plan).

[9] These sections include: § 365 (permitting a debtor to assume or reject executory contracts); § 505 (allowing the determination of a debtor's pre- and post-petition tax liability); § 507 (setting priorities in distribution of expenses and claims); § 524 (voiding judgments upon pre-petition debts and enjoining further collection efforts upon discharge); § 525 (protecting the debtor against government discrimination in licensing and employment on the basis of bankruptcy or insolvency); § 1141 (binding creditors to the terms of a confirmed plan and discharging all other claims and interests in the debtor's property); § 1142 (permitting the court to direct the performance of any act necessary to consummation of the plan); and, § 1143 (preventing an entity that fails to perform a required act within five years from confirmation of the plan from participating in the plan's distribution).

clear from the language of these sections that Congress intended them not to grant monetary relief, but rather to prevent any and all disruption of the orderly system of priorities under bankruptcy law and to provide to the debtor the judicial means necessary to enforce its right to a fresh start. *See United States v. Whiting Pools, Inc.*, 462 U.S. at 209; *Perez v. Campbell*, 402 U.S. at 648. Toward this end, § 106(c) empowers a bankruptcy court to enter findings over the claims and conduct of governmental units, and to bind them as it could any other creditor or entity. Thus, once again, where Congress intended to limit the relief granted to the debtor, it has done so through the individual triggered section, and not by reference to § 106(c).[10]

The final category of triggered sections clearly and unequivocally contemplates relief to a debtor in the form of a monetary judgment. While these sections are few in number, reflecting the intention of Congress to limit this relief by the nature of the triggered section, each such section is an exercise of a power unique to the bankruptcy laws that is exclusive, unrestricted and paramount under

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[10] Courts also have looked to the triggered section, rather than § 106(c), to interpret the scope of the waiver of sovereign immunity and the nature of the relief afforded the debtor. For example, § 525 of the Bankruptcy Code preserves the debtor's ability to pursue its livelihood by precluding a governmental unit from denying it a license merely because of insolvency. Courts uniformly interpret this section to waive sovereign immunity as to both federal and state governmental units. *See In re Watts*, 76 Bankr. 390 (Bankr. E.D. Pa. 1987); *Matter of Elsinore Shore Associates*, 66 Bankr. 708 (Bankr. D.N.J. 1986); *In re Coleman American Moving Services, Inc.*, 8 Bankr. 379 (Bankr. D. Kan. 1980). Yet, courts concur that § 525 does not create a private right of action for money damages. *See In re Begley*, 41 Bankr. 402 (E.D. Pa. 1984). Thus, the courts recognize that where Congress intended to provide only an action against the sovereign for declaratory and injunctive relief, it has done so through the individual triggered sections; there would be no need for such limitations to be implied under § 106(c).

the Supremacy clause of the United States Constitution. Art. I, § 8; *see Perez v. Campbell*, 402 U.S. at 660 (Blackmun, J. concurring), and cases cited therein. As shown below, it is clear from the language of those sections, as well as the essential role Congress intended these sections to play in implementing the bankruptcy laws, that these sections were intended to allow the award of monetary relief against a sovereign.

A. The Automatic Stay Was Intended to Provide a Direct Private Right of Action for Money Damages Against Any Violator.

The automatic stay provision embodied in § 362 of the Bankruptcy Code uniformly is recognized as one of the fundamental protections provided by the bankruptcy law, and is designed to remedy any interference with, or misappropriation of, the property of the estate. Indeed, it is designed to safeguard the property of the estate not only for the benefit of the debtor, but also to protect the interests of all creditors in the assets of the estate. *See* H.R. Rep. No. 595, 1978 U.S. Code Cong. & Admin. News at 6296; S. Rep. No. 989, 1978 U.S. Code Cong. & Admin. News at 5835.

There can be no doubt of Congress' intent to subject all sovereigns to the automatic stay. The legislative history of § 362 explicitly states that "this section and the other sections mentioned are intended to be an express waiver of sovereign immunity of the Federal government, and an assertion of the bankruptcy power over State governments under the Supremacy Clause notwithstanding a State's sovereign immunity." H.R. Rep. No. 595, 1978 U.S. Code Cong. & Admin. News at 6298-6300; S. Rep. No. 989, 1978 U.S. Code Cong. & Admin. News at 5837-38. Section 362 provides exceptions from operation of the stay for certain exercises of the police, regulatory and taxing powers of the sovereign, which

would be meaningless *unless* the stay applied to governmental units. § 362(b)(1), (4), (5), (8), (9) and (13).

The method by which Congress made § 362 applicable to all sovereigns also is significant. First, the waiver of sovereign immunity is accomplished merely by using the trigger word "entities" in § 362(a). Second, by choosing the trigger word "entities" rather than "creditors," Congress emphasized that the automatic stay applies whether or not the governmental unit has a claim against the estate. If the automatic stay is to be applied even where the government has no claim, *a fortiori*, it applies without the filing of a proof of claim.

Prior to the 1984 amendments to the Bankruptcy Code, § 362 had no explicit provision for money damages. Nevertheless, courts correctly held that violations of the automatic stay were tantamount to civil contempt, and thereby imposed monetary sanctions for willful and knowing disregard of the automatic stay. *See, e.g., In re Computer Communications, Inc.*, 824 F.2d 725 (9th Cir. 1987). On this basis, monetary damages were assessed against federal, state and municipal government entities for deliberate violations of the stay. *See In re Mack*, 46 *Bankr.* 652 (Bankr. E.D. Pa. 1985); *In re Burrow*, 36 *Bankr.* 960 (Bankr. D. Utah 1984); *In re Pyramid Rest. Equip. Co.*, 24 Bankr. 455 (Bankr. W.D.N.Y. 1982). *See also United States v. Norton*, 717 F.2d 767 (3d Cir. 1983).

The 1984 amendments added § 362(h), providing a direct private right of action for money damages for violations of the automatic stay, including costs and attorneys' fees and, in appropriate cases, punitive damages. No attempt is made under § 362(h) to limit its operation as against the sovereign, for example, by limiting recovery only against "persons." *See* § 101(35). Had Congress wanted to preclude sovereign liability against money damages, it could have incorporated such restrictions into § 362; and Congress surely would have done so in light of then-recent cases assessing monetary damages for contempt against governmental units. *See* cases cited, *supra*, at 20. Rather, no such limitation is expressed because none was intended. Thus, courts have interpreted § 362(h) as an integrated part of the automatic stay provisions and have applied it equally against governmental units.[11]

Thus, it is clear that § 106(c) authorizes money recovery against a sovereign under § 362, "notwithstanding any assertion of sovereign immunity" and notwithstanding any failure to file a proof of claim.

B. The Turnover Provision Was Intended to Permit Recovery of Money That Is Property of the Estate in the Possession of Any Entity.

As noted by this Court, Congress viewed the turnover provision as essential to the rehabilitation efforts of a debtor and to the congressional purposes behind the reorganization provisions. *United States v. Whiting Pools, Inc.*, 462 U.S. at 207-08.

The two operative subsections of the turnover provision of the Code expressly permit recovery of money from the sovereign. Subsection (a) of § 542 explicitly states that "an entity" shall deliver to the trustee "property or the value of such property . . . ." "Value" of property in lieu of the property itself clearly refers to the monetary

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[11] *See, e.g., United States v. Rinehart*, 88 Bankr. 1014 (D.S.D. 1988); *In re Allen*, 83 Bankr. 678 (Bankr. E.D. Mo. 1988); *In re Stucka*, 77 Bankr. 777 (Bankr. C.D. Cal. 1987); *In re Watts*, 76 Bankr. 390 (Bankr. E.D. Pa. 1987); *Matter of Davis*, 74 Bankr. 406 (Bankr. N.D. Oh. 1987). *See also In re Holland*, 77 Bankr. 954 (Bankr. S.D. Fla. 1987) (civil contempt).

value thereof. *See* H.R. Rep. No. 595, 1978 U.S. Code Cong. & Admin. News at 6325; S. Rep. No. 989, 1978 U.S. Code Cong. & Admin. News at 5870. Subsection (b) requires payment by "an entity" of debts owed to the estate. The use of "entity" indicates that § 542 applies to governmental units. *United States v. Whiting Pools, Inc.*, 462 U.S. at 209. The legislative history further emphasizes that § 542 is to apply to "any entity" and to "anyone holding property of the estate," without limitation. H.R. Rep. No. 595, 1978 U.S. Code Cong. and Admin. News at 6325; S. Rep. No. 989, 1978 U.S. Code Cong. & Admin. News at 5870; 124 Cong. Rec. at H32399; S33999.

Had Congress wanted to exclude governmental units from the scope of § 542, or otherwise restrict the available remedies against a sovereign thereunder, it could have done so. By making the entire section applicable to all entities, without limitation, Congress again expressed its intention to permit recovery of money from the sovereign.

C. The Avoidable Preferences Provision Permits Recovery of Money From Any Creditor.

Under § 547 of the Code, the trustee may avoid transfers of the debtor's property made while the debtor was insolvent and in satisfaction of a pre-petition debt, to the extent the transfer exceeds the distributive share of the debtor's assets that the creditor would otherwise have received under the Code. The use of the trigger word "creditor" demonstrates Congress' intention to permit recovery of money from any sovereign having a pre-petition claim against the estate, with or without a proof of claim. *See* § 101(9).

The legislative history is particularly instructive as to the applicability of § 547 in the context of the taxing power and, ultimately, as to the intended scope of the § 106(c) waiver. The initial legislative history of § 547

states that "the trustee would be able to recover only if the taxing authority did not have sovereign immunity or had waived it under proposed 11 U.S.C. § 106." H.R. Rep. No. 595, 1978 U.S. Code Cong. & Admin. News at 6329. This language indicates that a voluntary act by the sovereign, such as the assertion of a claim against the estate, was the type of waiver required to subject a sovereign to money judgments. However, it is critical to note that this House Report was written prior to the addition of proposed § 106(c) into the Code. The subsequent legislative history of § 547, issued concurrently with the legislative history concerning § 106(c), states:

> Section 547(b)(2) of the House amendment adopts a provision contained in the House bill and rejects an alternative contained in the Senate amendment relating to the avoidance of preferential transfer that is payment of a tax claim owing to a governmental unit. As provided, section 106(c) of the House amendment overrules contrary language in the House report *with the result that the Government is subject to avoidance of preferential transfers.*

124 Cong. Rec. at H32400; S34000; (emphasis added). In other words, with the addition of the involuntary waiver of sovereign immunity under § 106(c), Congress explicitly subjected the government to avoidance of preferential transfers, merely by the use of the trigger word "creditor" in § 547(b).

Additionally, this contrast in the legislative history has greater significance as to the scope of the § 106(c) waiver in general. Whereas the pre-§ 106(c) House Report would have required some affirmative act by the sovereign to subject it to money damages, the later legislative history clarifies that § 106(c) constitutes an involuntary waiver that extends to money judgments under any of the triggered sections that provide for monetary relief.

From the foregoing, and when read in conjunction with "the provisions of the whole law, and to its object and

policy," *Kelly v. Robinson*, 479 U.S. at 43, it is clear that Congress intended to create a cause of action for monetary relief in favor of the debtor for violation of these sections by *any* entity or creditor. As in the case of the other categories, Congress once again delineated the scope of the relief within the triggered section itself.

III. THE COURT OF APPEALS' INTERPRETATION OF SECTION 106(C) WOULD DEFEAT THE ESSENTIAL POLICIES OF THE BANKRUPTCY CODE.

Lastly, the interpretation given § 106(c) by the Court of Appeals invariably would lead to the creation of a right without a remedy, a result so anomalous and inconsistent with the policies underlying the Bankruptcy Code that Congress could not have intended to imply such restrictions into the Code. *See United States v. Turkette*, 452 U.S. 576, 580 (1981).

For example, applying the reasoning of the Court of Appeals, if a governmental unit was found by a bankruptcy court to have wrongfully taken and sold the property of the debtor, the court would be limited merely to determining that the governmental unit did not have a right to the property, but it could not order the return of the monetary proceeds wrongfully taken. Surely, Congress could not have intended such a bizarre result under a statute that is designed, first and foremost, to protect the assets of the bankrupt estate.

Similarly, under the reasoning of the Court of Appeals, a governmental unit wrongfully could withhold money belonging to the estate as a set-off against money debts owed by the debtor to the government. To the extent that such an action was outside the scope of set-offs permitted under § 553 of the Code, it would constitute a violation of the automatic stay under § 362. Yet, if a debtor were not empowered under § 106(c) to employ the remedies provided in §§ 362 or 542, the government would attain a preferred status above all other creditors. Congress did

not intend to permit a governmental unit to so subvert the orderly system of equitable distribution under the Code. *See Matter of McVey Trucking, Inc.*, 812 F.2d at 328. To the contrary, the Code explicitly sets forth the rights of governmental units in an insolvent's estate within that system of equitable distribution, and generally rejects the notion of a governmental unit as a "supercreditor."

Another illustration of the anomalous consequences flowing from the reasoning of the Court of Appeals is the common situation where a governmental unit seizes property of the estate under a tax lien prior to the petition and thereafter sells the property during the post-petition period. Had the debtor filed a turnover action to recover the property prior to the sale, the Court of Appeals would hold that, under § 106(c), the government would be subject to the jurisdiction of the bankruptcy court and could be ordered to return the property. On the other hand, if the government beat the debtor to the auction block, the Court of Appeals would preclude the debtor from instituting a § 542(a) turnover action to recover the "value of the property."

Further, under the example above, what if the amount recovered by the government from the tax sale exceeded the amount of the lien? Under any interpretation, the government's interest in the property could not exceed the amount of its lien, and any surplus funds unquestionably would be the property of the estate. Yet, the Court of Appeals' interpretation of § 106(c) would preclude a turnover action to recover the excess money in possession of the government, since such an action would result in a monetary judgment and go beyond a determination of the sovereign's right in the debtor's estate. This is the precise situation presented in *Tew v. Arizona State Retirement System*, in which the district court, not surprisingly, held that § 106(c) waived the state's sovereign immunity from suit, and ordered the state to turn over the excess proceeds to the trustee. 78 Bankr. at 330.

These examples merely illustrate the incongruous results flowing from the interpretation given § 106(c) by the Court of Appeals. Under that interpretation, a bankruptcy court would be free to determine that a governmental unit violated the rights of the debtor, but would be precluded from issuing any effective remedy. No possible purpose would be served by such a waste of judicial resources. Even worse, such a result would eviscerate the most fundamental protections provided both debtors and creditors under the Bankruptcy Code, and countermand the Code's policy of treating sovereigns within the established system of equitable distribution. This result simply could not have been intended by Congress.

CONCLUSION

The Court of Appeals, in attempting to discern the will of Congress, instead has thwarted it. The limitations that the Court of Appeals would imply into the express waiver of sovereign immunity under § 106(c) cannot be supported. Indeed, they explicitly contradict the plain language of the statute, its legislative history, the language of the sections triggered under § 106(c) and, ultimately, the very fabric of the Bankruptcy Code itself. We therefore respectfully submit that the decision of the United States Court of Appeals for the Second Circuit is erroneous and must be reversed.

Respectfully submitted,

MICHAEL E. FRIEDLANDER
Counsel of Record
CHARLES R. WORK
JACQUELINE E. ZINS
SETH D. GREENSTEIN
McDERMOTT, WILL & EMERY
1850 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-8000
Counsel for INSLAW, Inc.

February 23, 1989

AMICUS CURIAE

BRIEF

No. 88-412

UNITED STATES SUPREME COURT

October Term, 1988

MARTIN W. HOFFMAN, Trustee,

Petitioner,

v.

STATE OF CONNECTICUT,
DEPARTMENT OF INCOME MAINTENANCE, et al.

Respondents.

BRIEF OF AMICUS CURIAE STATE OF ARIZONA IN SUPPORT OF THE RESPONDENTS

ROBERT K. CORBIN
Attorney General
State of of Arizona

ANTHONY B. CHING*
Solicitor General
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for Amicus
Curiae State of Arizona

*Counsel of Record

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ROBERT K. CORBIN
Attorney General
State of of Arizona

ANTHONY B. CHING*
Solicitor General
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for Amicus
Curiae State of Arizona

*Counsel of Record

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STATEMENT OF INTEREST

This brief amicus curiae is submitted by the State of Arizona because of its interest in the extent of the Eleventh Amendment bar as to lawsuits brought by bankruptcy trustees against the state and its agencies.

Presently, Arizona is involved in three federal court proceedings in which bankruptcy trustees have sued state agencies, purportedly under provisions of the Bankruptcy Code. These cases are:

1. Tew v. Arizona State Retirement System, No. 87-5946, Court of Appeals for the Eleventh Circuit. This case involves a lawsuit brought by a Florida citizen, Tew, the trustee, against an Arizona state agency to recover monies allegedly belonging to the bankrupt estate arising out of security transactions between the bankrupt, ESM Government Securites, Inc., and the state agency.

2. Swaine v. Arizona Registrar of Contractors, No. 88-15190, Court of Appeals for the Ninth Circuit. This case involves a lawsuit brought by an Arizona citizen, bankruptcy trustee Swain, against an Arizona state agency to recover monies paid by the bankrupt contractor into a statutory recovery fund administered by the state agency for the protection of the State and its consumers.

3. Outlaw Hideaway, Inc. v. State of Arizona, No. CIV 89-0004 TUC WDB, United States District Court for the District of Arizona. This case concerns an order of the Bankruptcy Court ordering the State of Arizona, the Attorney General and the Arizona Liquor Board to reinstate the liquor license of a bankrupt bar whose liquor license had been revoked by the State based on licensee's misconduct.

In all the above cases the Eleventh Amendment defense has been raised by the State of Arizona.

SUMMARY OF ARGUMENT

The three cases in which Arizona is involved include one which implicates the facial language of the "pure vanilla" aspect of the Eleventh Amendment, i.e. a citizen of Florida suing another state, Arizona. The other two cases concern the "sovereign immunity" aspect of the Eleventh Amendment, i.e. a citizen of Arizona suing his own state, the State of Arizona. Hans v. Louisiana, 134 U.S. 1 (1890).

Arizona's argument, therefore, is twofold: one, as to the "pure vanilla" situation, Arizona contends that Congress lacks the power to abrogate the Eleventh Amendment bar because of the total lack of Article III jurisdiction; two, as to the "sovereign immunity" situation, Arizona believes that there is absent clear, unmistakable language in the Bankruptcy Code to abrogate the "sovereign immunity" aspect of the Eleventh Amendment.

ARGUMENT

I

CONGRESS CANNOT ABRROGATE THE "PURE VANILLA" ELEVENTH AMENDMENT BAR TO FEDERAL COURT JURISDICTION

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment was adopted to overrule the Supreme Court's decision in Chisholm v. Georgia, 2 Dall. 419 (1793), which held that, under Article III of the Constitution, a citizen of South Carolina could sue the State of Georgia in the federal court. The Chisholm decision was based on the language in Article III, § 2, which provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority; * * * --between a state and citizen of another State; . . .

> and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

The language of the Eleventh Amendment unmistakably amended Article III so that the authorization of judicial power over cases in law and equity, insofar as they are between a state and a citizen of another state or citizen or subjects of a foreign state, was completely removed from Article III, § 2 of the Constitution. Accordingly, after the adoption of the Eleventh Amendment the federal judicial power does not extend to controversies between a state and a citizen of another state, or between a state and citizens and subjects of a foreign state.

The question as to Congressional power to enlarge Article III jurisdiction was resolved long ago by the leading case of Marbury v. Madison, 1 Cranch 137 (1803). Marbury involved an act of Congress granting the Supreme Court original mandamus

jurisdiction over public officers, a power not conferred by Article III. Chief Justice Marshall's opinion in that case unequivocally held that the act was unconstitutional and that the Court cannot exercise original jurisdiction when Article III has not allocated such power to it. Likewise, Congress cannot create standing for Article III purposes contrary to the case or controversy limitation. "Congress can, of course, resolve the question [standing] one way or another, save as the requirements of Article III dictate otherwise." Association of Data Processing v. Camp, 397 U.S. 150, 154 (1970).

The specific question of Congressional power under the Bankruptcy Act to override Article III was answered by the Supreme Court in Northern Pipeline Construction v. Marathon Pipe Line Co., 458 U.S. 50 (1982). In that decision, the Court concluded that Congress could not use Article

I powers, such as the Bankruptcy Clause, to create bankruptcy court judgeships without complying with Article III's requirement of life tenure and undiminished salary. Similarly, where Article III power is absent and the explicit commands of the Eleventh Amendment prohibit it, Congress could not employ its Article I bankruptcy powers to empower the federal court to exercise judicial power over a controversy between a citizen of a state and another state.

Lastly, any argument that the Eleventh Amendment applies only to party jurisdiction and not to federal question jurisdiction has been put to rest by this Court in Welch v. Texas Department of Highways, 483 U.S. ___, 107 S.Ct. 2941 (1987). In Welch this Court unequivocally held: "Federal question actions unquestionably are suits 'in law or equity'; thus, the plain language of the [Eleventh Amendment] refutes this argument." 483 U.S. at ___, 107

S.Ct. at 2952.

It might be contended as a matter of policy that the Constitution should not make a state a preferred creditor in every bankruptcy. See In re McVey Trucking, Inc., 812 F. 2d 311, 328 (7th Cir. 1987), cert. denied, __ U.S. __, 108 S.Ct. 222 (1987).[1/] However, that contention is squarely refuted by this Court's latest command in Welch "[t]hat States are not liable in other circumstances is a necessary consequences of their role in a system of dual sovereignties." Welch, 483 U.S. ___, ___, 107 S.Ct. 2947, 2953.

Moreover, the lack of jurisdiction in the federal court does not mean that the trustee is without a forum. A bankrupt trustee can always sue in the state court. See e.g. Gutmacher v. H&J Constr. Co., 101 Ariz. 346, 419 P.2d 525 (1966).

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2. McVey is of doubtful validity in light of this Court's decision in Welch v. Texas Department of Highways, supra.

II

IN THE BANKRUPTCY CODE, CONGRESS HAS NOT ABROGATED THE "SOVEREIGN IMMUNITY" ASPECT OF THE STATES' ELEVENTH AMENDMENT

Although the literal language of the Eleventh Amendment covers only a lawsuit brought by the citizen of a state or foreign state against another state, in Hans v. Louisiana, 134 U.S. 1 (1890), this Court held that the Eleventh Amendment also bars a lawsuit brought against the State of Louisiana by its own citizens. This Court reasoned that, although the literal language of the Eleventh Amendment did not include such a suit, sovereign immunity, which is embodied in the Eleventh Amendment, prohibited such a suit. The result of the Hans decision is to give the Eleventh Amendment two components: (1) to prohibit a federal court lawsuit between a citizen of one state against another state (the pure vanilla type); and (2) to preclude a federal court lawsuit between a

citizen of a state against his own state (sovereign immunity).

Arizona has no quarrel with the doctrine that, under the broad grant of power to Congress under Section 5 of the Fourteenth Amendment, Congress can legislatively abrogate the Eleventh Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). However, with the overruling of Parden v. Terminal Ry., 377 U.S. 184 (1964), by Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. ___, 107 S.Ct. 2941 (1987), there is no longer any authority which supports the theory that Congress may abrogate the Eleventh Amendment immunity outside of the Fourteenth Amendment. This issue is an open question. In Welch this Court cautioned:

> We assume, without deciding or intimating a view of the question that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment.
> 483 U.S. at ____, 107 S.Ct. at 2946.

As Arizona's argument in I, supra, points out, there is absent any constitutional authority for Congress to abrogate the "pure vanilla" type of Eleventh Amendment defense because of the total lack of Article III jurisdiction. As to the "sovereign immunity" component of the Eleventh Amendment, although there may well be constitutional or policy arguments to conclude that Congress should not have the power to subject unconsenting states to federal court jurisdiction, Arizona believes that it is unnecessary for this Court to answer this complex question in this case.

Assuming, arguendo, that Congress may abrogate a state's Eleventh Amendment "sovereign immunity" under the bankruptcy clause in Article I of the Constitution, the exercise of that power is governed by the rule laid down in Welch. The rule is that "Congress must express its intention to abroate the Eleventh Amendment in unmis-

takable language in the statute itself." Welch, 483 U.S. at ___, 107 S.Ct. at 2946 (1987); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985).

The answer to the application of the above rule must be found in the Bankruptcy Code. Section 106 of the Bankruptcy Code provides:

> § 106. Waiver of sovereign immunity.
>
> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governernmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertions of sovereign immunity--
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of

an issue arising under such a provision binds governmental units.

The limitation on Congressional power to waive state sovereign immunity was understood by Congress. The notes of the Committee on the Judiciary, Senate Report No. 95-989, states:

> Section 106 provides for a limited waiver of sovereign immunity in bankruptcy cases. Though Congress has the power to waiver sovereign immunity for the Federal government completely in bankruptcy cases, the policy followed here is designed to achieve approximately the same result that would prevail outside of bankruptcy. Congress does not, however, have the power to waive sovereign immunity completely with respect to claims of a bankruptcy estate against a State, though it may exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy.

There is, however, a limited change in the result from the result that would prevail in the absence of bankruptcy; the change is two-fold and is within Congress' power vis-a-vis both the Federal Government and the States. First, the filing of a proof of claim against the estate by a governmental unit is a waiver by that governmental unit of sovereign immunity with respect to compulsory counterclaims, as defined in the Federal Rules of Civil

Procedure, that is, counterclaims arising out of the same transaction or occurrence. The governmental unit cannot receive distribution from the estate without subjecting itself to any liability it has to the estate within the confines of a compulsory counterclaim rule. Any other result would be one-sided. The counterclaim by the estate against the governmental unit is without limit.

Second, the estate may offset against the allowed claim of a governmental unit, up to the amount of the governmental unit's claim, any claim that the debtor, and thus the estate, has against the governmental unit, without regard to whether the estate's claim arose out of the same transaction or occurrence as the government's claim. Under this provision, the setoff permitted is only to the extent of the governmental unit's claim. No affirmative recovery is permitted. Subsection (a) governs affirmative recovery.

Though this subsection creates a partial waiver of immunity when the governmental unit files a proof of claim, it does not waive immunity if the debtor or trustee, and not the governmental unit, files proof of a governmental unit's claim under proposed 11 U.S.C. 501(c).

This section does not confer sovereign immunity on any governmental unit that does not already have immunity. It simply recognizes any immunity that exists and prescribes the proper treatment of claims by and against that

sovereign.
See Historical and Revision Notes, 11 U.S.C.A. § 106 at p. 95. S. Rep. 95-989, U.S. Code Cong. & Adm. News, 95th Cong. 2d Sess., p. 6274 (emphasis added).

Arizona does not dispute the notion that if a state submits a claim in a bankruptcy proceeding, it would have waived its sovereign immunity and be subject to suit under § 106(a) or (b). However, in this case Connecticut has not submitted any claim in the Bankruptcy Court.

Additionally, Arizona submits that § 106(c) does not evidence Congressional intent to unmistakably abrogate the Eleventh Amendment. First of all, on its face, § 106(c) does not even mention the Eleventh Amendment, nor its abrogation. Accordingly, on its face nothing in § 106(c) satisfies the Welch test that there must be "unmistakable language in the statute itself."

To the extent that Congressional history can be used, the joint explanatory

statement by the manager of the House-Senate Conference Committee on the Bankruptcy Reform Act of 1978 stated:

> Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor", "entity" or "governmental unit" in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir., 1975), and in re Dolard, 519 F.2d 282 (9th Cir., 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in sections 106(a) and (b), subsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby overruled.

See Historical and Revision Notes, 11 U.S.C.A. § 106 at pp. 95-96. U.S. Code Cong. & Admin. News, 95th Cong., 2d Sess., p. 6440.

The Gwilliam and Dolard cases both concern disputes between the trustee in bankruptcy and the United States concerning whether Congress had waived United States sovereign immunity as to the bankruptcy court's jurisdiction to adjudicate a bankrupt's tax liability when IRS did not file a claim. As Gwilliam v. United States pointed out, there was a conflict on this issue among the courts with the Ninth Circuit ultimately siding with In re Durensky, 377 F.Supp. 798 (N.D.Tex. 1974); with the Fifth Circuit, In re Statemaster Corp., 465 F.2d 978 (5th Cir. 1972), and In re O'Ffill, 368 F.Supp. 345, 351 (D.Kan. 1973), on the opposite side. See Gwilliam v. United States, 519 F.2d 407, 409 (9th Cir. 1975). Clearly, § 106(c) was enacted to resolve that conflict among the federal courts and to expressly waive only the Unites States' sovereign immunity in tax matters.

The application of traditional statu-

tory construction rules requires that § 106(c) be read together and in harmony with §§ 106(a) and (b). Richard v. United States, 369 U.S. 1, 11 (1962); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307-308 (1961); McMahon v. United States, 342 U.S. 25 (1951). When read together, it is abundantly clear that §§ 106(a)'s and (b)'s limited waiver of sovereign immunity could not have been repealed by 106(c). As the court below explained,

> Having considered the language and legislative history of § 106 in light of the strict standard applicable to claims of congressional waiver of state eleventh amendment immunity, we hold that § 106(c) does not allow for actions pursuant to § 542(b) or § 547(b) to recover monies from a state . . ..
> In re Willington Convalescent Home, Inc., 850 F.2d 50, 57 (2d Cir. 1988).

A number of other courts have come to the same conclusion. See e.g. In re Zera, 72 B.R. 997 (Bankr. D.Conn. 1987); In re Friendship Medical Center, Ltd., 710 F.2d 1297 (7th Cir. 1983) (the filing of a proof

of claim does not waive states' Eleventh Amendment defense); Swayne v. Washington (In re Crum), 20 B.R. 160 (Bankr. D.Idaho 1982); Regal Constr. v. Maryland, 18 B.R. 353 (Bankr. D.Md. 1982); Cohen v. Illinois Dep't of Pub. Aid (In re Ramos), 12 B.R. 250 (Bankr. N.D.Ill. 1981). See also Ohio v. Madeline Marie Nursing Homes, 694 F.2d 449 (6th Cir. 1982) (Congress did not abrogate the Eleventh Amendment in the 1898 Bankruptcy Act). Cf. BV Engineering v. University of Cal., Los Angeles, 858 F.2d 1394 (9th Cir. 1988); WJM, Inc. v. Massachusetts Dep't of Public Welfare, 840 F.2d 996 (1st Cir. 1988); Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988).

The weight of authority clearly supports the argument that, in the Bankruptcy Code, Congress has not abrogated the states' sovereign immunity under the Eleventh Amendment. Authorities to the oppo-

site, such as In re McVey Trucking, Inc., 812 F.2d 311 (7th Cir. 1987) (avoiding powers under 11 U.S.C. § 547(b)), cert. denied, ___ U.S. ___, 108 S.Ct. 227 (1987), are of little precedential value since they do not discuss the strict standard required by Atascadero, nor the overruling of Parden by Welch.

CONCLUSION

Arizona respectfully submits that the decision of the Court below is correct and should be affirmed.

Arizona further submits that in this case this Court should draw a "bright line" between the "pure vanilla" Eleventh Amendment bar and the "sovereign immunity" Eleventh Amendment defense, and hold that, in the "pure vanilla" instance, Congress lacks the power to abrogate the Eleventh Amendment and to confer Article III jurisdiction in suits between a state and a citizen of

another state or citizens or subjects of a foreign state.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General
State of of Arizona

ANTHONY B. CHING
Solicitor General
1275 West Washington Street
Phoenix, Arizona 85007

Attorneys for Amicus
Curiae State of Arizona

AMICUS CURIAE

BRIEF

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NEIL F. HARTIGAN
Attorney General, State of Illinois

ROBERT J. RUIZ
Solicitor General, State of Illinois

JAMES C. O'CONNELL *
BARBARA L. GREENSPAN
Special Assistant Attorneys General
One North LaSalle Street, Suite 1900
Chicago, Illinois 60602
(312) 793-2380

Attorneys for Amicus Curiae, State of Illinois

* Counsel of Record

(Additional Attorneys General listed on following page)

Printed by Authority of the State of Illinois (P.O. 34403—60—3-24-89)

Additional Attorneys General

WARREN PRICE, III
Attorney General
State of Hawaii
State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

LINLEY E. PEARSON
Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
Louisiana Department of Justice
234 Loyola Avenue, 7th Floor
New Orleans, Louisiana 70112
(504) 568-5575

FRANK J. KELLEY
Attorney General
State of Michigan
752 Law Building
Lansing, Michigan 48933
(517) 373-1124

ROBERT M. SPIRE
Attorney General
State of Nebraska
State Capitol, Room 2115
Lincoln, Nebraska 68509
(402) 471-2682

JOHN P. ARNOLD
Attorney General
State of New Hampshire
State House Annex
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

LACY H. THORNBURG
Attorney General
State of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-3377

NICHOLAS J. SPAETH
Attorney General
State of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

T. TRAVIS MEDLOCK
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

CHARLES W. BURSON
Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6474

JAMES MATTOX
Attorney General
State of Texas
P.O. Box 12548
Capital Station
Austin, Texas 78711
(512) 463-2120

R. PAUL VANDAM
Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

JEFFREY L. AMESTOY
Attorney General
State of Vermont
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

MARY SUE TERRY
Attorney General
Commonwealth of Virginia
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4072

CHARLES G. BROWN
Attorney General
State of West Virginia
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 348-2021

DONALD J. HANAWAY
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, Wisconsin 53707
(608) 266-8549

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STATEMENT OF INTEREST

The *amici curiae* States of Illinois, Hawaii, Indiana, Louisiana, Michigan, Nebraska, New Hampshire, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin, submit this brief in support of the State of Connecticut requesting the affirmance of the decision rendered by the United States Court of Appeals for the Second Circuit in *Hoffman v. State of Connecticut, Department of Income Maintenance*, 850 F.2d 50 (2d Cir. 1988).

The Eleventh Amendment was designed to preserve the important principle of federalism and to protect states from unwarranted intrusions by the federal courts into state treasuries. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (*Pennhurst II*) (relying on *Hans v. Louisiana*, 334 U.S. 1, 15 (1890)); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). The vitality of this constitutional protection has been frequently and consistently reaffirmed by this Court, most recently in *Welch v. Texas Department of Highways and Public Transportation*, ___ U.S. ___, 107 S.Ct. 2941, 2949-53 (1987).

The decision of the Court of Appeals for the Second Circuit, if reversed, will have a nationwide effect by substantially broadening the scope of state liability under the Bankruptcy Code and amending the power of Congress to negate the protection afforded to the states under the Eleventh Amendment, enabling this important constitutional protection to be abrogated by less than clear and unequivocal language. The decision of the court below is in accord with a large body of law already developed by

this Court concerning the importance of the Eleventh Amendment within our federal system and the limitations on Congress' authority to affect that system.

SUMMARY OF ARGUMENT

The Court of Appeals found that the language of Section 106(c) of the Bankruptcy Code did not abrogate the states' Eleventh Amendment immunity. The court reasoned that the language of Section 106(c) did not contain the clear and unequivocal Congressional waiver of the states' Eleventh Amendment immunity heretofore held necessary to alter the immunity given the states by the framers. This decision is in accord with the constitutional protections afforded to the states and carefully preserved by this Court. In view of the important functions performed by the states for the benefit of their citizens, public policy and well-settled law dictate that this protection from federal intrusion should not be stripped away silently without the knowledge and consent of the states and without the crystal clear statement from Congress that it so intended to affect the states.

Alternatively, the *Willington* judgment should be affirmed on the recoupment independent ground for affirmance. Compelling public policy reasons favor this, since the welfare of the ultimate intended beneficiaries of the Medicaid Program—the frail, institutionalized elderly—is at stake if the prompt delivery of Medicaid services is compromised.

ARGUMENT

I.

THE *WILLINGTON* JUDGMENT SHOULD BE AFFIRMED BECAUSE THE BANKRUPTCY CODE DOES NOT CONTAIN A CLEAR AND UNEQUIVOCAL WAIVER OF THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The Court has frequently reaffirmed the vitality of the doctrine of sovereign immunity. In *Welch v. State Department of Highways and Public Transportation*, ___ U.S. ___, 107 S.Ct. 2941 (1987), the Court stated that

> [W]e have required that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S. Ct. 3142, 3148, 87 L.Ed. 171 (1985). We have been unwilling to infer that Congress intended to negate the States' immunity from suit in federal court, given "the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst II, supra*, 465 U.S., at 99, 104 S.Ct., at 907. Moreover, the courts properly are reluctant to infer that Congress has expanded our jurisdiction.

107 S.Ct. at 2946.

While a literal reading of the Eleventh Amendment would not preclude a suit against a state by one of its own citizens, the Supreme Court has consistently held that an unconsenting state is immune from suits brought in federal court by her own, as well as foreign citizens. *Hans v. Louisiana*, 134 U.S. 1, 16 (1980).[1] Moreover, the

[1] Constitutional amendments as well as the doctrine of sovereign immunity apply to proceedings before the federal bankruptcy

(Footnote continued on following page)

bar of the Eleventh Amendment extends to actions against state agencies acting as arms of the state. *State of Alabama v. Pugh*, 438 U.S. 781, 782 (1979) (suit barred against agencies such as a state board of corrections); *Brennen v. University of Kansas*, 451 F.2d 1287, 1290 (10th Cir. 1971).

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985), the Court held that certain provisions of the Rehabilitation Act did not constitute an abrogation of the Eleventh Amendment.

> Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion.

473 U.S. at 242, 105 S.Ct. at 3147.

In *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), the Court stated:

> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

In *Atascadero State Hospital*, the Court specifically approved the reasoning in *Edelman v. Jordan*, finding that the interpretation to be given the Eleventh Amendment had not changed since the Court had addressed the issue in *Edelman*.

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[1] *continued*

courts. See *United States v. Rome*, 414 F. Supp. 517, 519 (D. Mass. 1976) (Fifth Amendment applies to bankruptcy proceedings) and *In Re Oxford Marketing Ltd.*, 444 F. Supp. 399, 403 (N.D. Ill. 1978) (sovereign immunity limits actions against government in bankruptcy).

There are decisions nationwide affirming the viability of the Eleventh Amendment's prohibition against suing a state agency for monetary relief in the federal courts. *See In Re Friendship Medical Center*, 710 F.2d 1297, 1301 (7th Cir. 1983); *Carey v. Quern*, 588 F.2d 230, 233 (7th Cir. 1978); *Townsend v. Edelman*, 518 F.2d 116, 121-122 (7th Cir. 1975); *Wilson v. Weaver*, 499 F.2d 155, 158 (7th Cir. 1974). *See also WJM, Inc. v. Massachusetts Department of Public Welfare*, 840 F.2d 996, 1002 (1st Cir. 1988); *State of Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982); *In Re Ramos*, 12 B.R. 251 (N.D. Ill. 1981); *In Re Regal Construction Co., Inc.*, 18 B.R. 353, 357 (D. Md. 1982).

The Court has explicitly held that the only relevant factor in determining whether Eleventh Amendment immunity exists is the source of the funds to be paid should plaintiff prevail on the merits of its claims. If the funds are to be paid out of the state's treasury, plaintiff's claims are barred by operation of the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. at 663.

The Seventh Circuit, in *McVey Trucking, Inc. v. Secretary of State of Illinois*, 812 F.2d 311 (7th Cir.) *cert. denied*, 108 S.Ct. 227 (1987), held that Congress intended to waive the States' sovereign immunity and create an action for money damages enforceable against uncontesting states when it enacted the preference provision in the Bankruptcy Code. 11 U.S.C. §547(b). *McVey* should not be followed by this Court. Rather, the Court should affirm the decision of the Second Circuit and rectify the conflict between the circuits in favor of the settled interpretation of the Eleventh Amendment.

In *McVey*, the debtor brought an action under 11 U.S.C. §547(b) to recover funds that it claimed were improperly transferred to the Secretary of State of Illinois. McVey

Trucking had placed certificates of deposit with two banks, payable to the Secretary of State, reflecting the balance that McVey owed to the State for its prospective highway use. McVey was shortly thereafter placed into involuntary bankruptcy. Three weeks after the bankruptcy proceedings began, the Secretary of State requested that the bank remit the amount of the deposits to the State. Without requesting permission from the bankruptcy court, the bank made the payments to the State. McVey then sued the State to avoid the transfer, pursuant to 11 U.S.C. §547(b).

The *McVey* court reasoned that when Congress enacted §547(b), it was exercising its plenary power, and, therefore, that "Congress had the power to create a cause of action for money damages enforceable against an unconsenting state in federal court. The question then becomes whether, in enacting this provision, Congress intended to use its contractual power." 812 F.2d 311, 323. The court found that it was clear that Congress intended in enacting §547(b) to create an enforceable action against the State for money damages. The court reasoned as follows. Section 547(b) uses the word "creditor." In defining "creditor" for purposes of the Bankruptcy Code, §106(c) provides that "creditor . . . applies to governmental units." 11 U.S.C. §106(c). Since the state is not a governmental unit, and since state governmental units are not explicitly excluded from the definition of "creditor", the Seventh Circuit reasoned that states are therefore subject to suit under the Bankruptcy Code.

In light of the rationale used by the Court in *Welch*, reaffirming the clear and unequivocal statutory language that is required for waiver of the states' Eleventh Amendment immunity, the *McVey* court's reasoning is incorrect and goes too far.

The Bankruptcy Code provides for the waiver of sovereign immunity only when a state files a claim against the estate of a debtor. Section 106 is simply designed to prevent a governmental unit from filing a claim against the debtor and at the same time seeking to shield itself from counterclaims under the guise of sovereign immunity. The Seventh Circuit ignored the legislative history and the plain language of Section 106(c)(2). That language and the legislative history clearly demonstrate that the statute does no more than confine the scope of section 106(c)'s waiver of sovereign immunity to actions where a bankruptcy court seeks to bind a government agency to a determination not requiring a payment of money from the agency to the bankrupt estate. That reading harmonizes Section 106(c) with Sections 106(a) and (b) and is supported by the legislative history explaining the Conference Committee's decision to add Section 106(c).

In *Welch v. State Department of Highways and Public Transportation*, ____ U.S. ____, 107 S.Ct. 2941 (1987), the Court considered whether the Jones Act contained an unmistakably clear expression by Congress that it intended to abrogate the states' Eleventh Amendment immunity from suit in federal court.

> It is true that the [Jones] Act extends to "*[a]ny* seaman who shall suffer personal injury in the course of his employment," §33 (emphasis added). But the Eleventh Amendment makes a constitutional distinction between the States and other employers of seamen. Because of the role of the States in our federal system, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." . . . In *[Atascadero v.] Scanlon* the Court held that §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, that provides remedies for "any recipient of Federal assistance," does not contain the un-

> mistakable language necessary to negate the States' Eleventh Amendment immunity. For the same reasons, we hold today that the general language of the Jones Act does not authorize suits against the States in federal court.

107 S.Ct. at 2947. Citations omitted. Likewise, here, the general reference to "governmental units" contained in 11 U.S.C. §106(c) is not the "unequivocal statutory language sufficient to abrogate the Eleventh Amendment." Without an explicit reference to actions for money damages against the states, courts may not infer one. Section 106(c) "rounds out the express statutory waiver of sovereign immunity by preventing the government from attempting to avoid involvement in bankruptcy proceedings while still enforcing claims against the debtor." *2 Collier on Bankruptcy*, ¶106.04 at 106-9.

There is nothing in the language of §106(c), §542, §547(b), or anywhere in the Bankruptcy Code that abrogates the states' Eleventh Amendment immunity. Surely if Congress had intended to give the bankruptcy court greater jurisdiction than the other federal courts, Congress would have explicitly and unequivocally done so. The Supreme Court has never said that while Congress must use "unequivocal statutory language" to waive the states' Eleventh Amendment immunity in the United States district court, Congress may waive the states' Eleventh Amendment immunity by inference in regard to proceedings in bankruptcy court. The same standard of clear, unequivocal waiver applies equally in any federal forum. In light of the rationale applied in *Welch*, reaffirming the standard to be applied in determining whether Congress has waived the states' Eleventh Amendment immunity, this Court should decline to follow the *McVey* case. The *amici* states submit that reversal of the decision below would result in

the diminution of the states' Eleventh Amendment protections and would ultimately restrict the states in essential government functions.[2]

II.

IN THE ALTERNATIVE, THE *WILLINGTON* JUDGMENT SHOULD BE AFFIRMED ON THE RECOUPMENT INDEPENDENT GROUND FOR AFFIRMANCE.

In the *Willington* record, there is also a second ground for affirmance.[3] The *amici* call to the Court's attention the compelling public policy reasons for affirming the *Willington* judgment on the recoupment independent ground for affirmance.

Many of the *amici* states utilize Connecticut's prospective Medicaid reimbursement system pursuant to which the state Medicaid agency takes the word of the nursing

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[2] *Amici* do not concede the issue currently pending in this Court in *Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted* 108 S.Ct. 1219 (1988), which is whether Congress has the power under the Commerce Clause to abrogate the Eleventh Amendment. Rather, *amici* agree with the position set forth in the Respondent state agency's brief that Congress lacks the power to abrogate a constitutional amendment pursuant to its Art. I, §8 general legislative power.

[3] The District Court specifically found:

> "However, should the Court of Appeals for the Second Circuit or the United States Supreme Court conclude that the bankruptcy court did properly assert jurisdiction over the trustee's claim, it is found—for essentially the reasons given in the Brief and reply Brief of the Appellants [i.e. the state Medicaid agency]—that the terms of Willington's contract with Connecticut entitled the state to recoup past overpayments to Willington by withholding the funds due for services in March, 1983." Pet. App. to Cert. Pet. at A70-A71.

The Court of Appeals left this independent ground for affirmance undisturbed and the petitioner has *not* appealed this in this Court.

home provider as to the amount of its patient care costs set forth in its sworn annual cost report, and the nursing home's reimbursement rates are set and paid out in reliance, subject, of course, to subsequent field auditing and retroactive recomputation and recoupment of past overpayments where false cost claims and/or Medicaid fraud are detected.

The public policy reason for this type of state Medicaid reimbursement system is obvious: it results in the requisite monies for the care of the frail, institutionalized elderly (the intended beneficiaries of the Medicaid Program) being delivered in the fastest possible manner.

The other critical fact in the *Willington* case which is also common in the *amici* states is the nursing home Medicaid provider practice of the owners of the nursing home to own personally all of the assets such as land, buildings and furnishings, and to form a corporation to constitute the operating nursing home with, of course, the corporation being the Medicaid provider. In this way, nursing home owners can file only the assetless corporation in bankruptcy to discharge the debts, while the owners themselves remain out of bankruptcy and retain personal ownership of all the assets.

Keeping these facts in mind, let us examine what the *Willington* nursing home owners attempted and the public policy disaster which would result if the petitioner's legal efforts attained success, which disaster would be inflicted upon both the Medicaid Program nationwide and, just as if not more importantly, upon the frail institutionized elderly who are the intended beneficiaries of that program.

For the *Willington* nursing home owners (who owned 100% of the assets personally) filed annual operating corporation sworn cost reports falsely claiming $294,007.00 in real property costs which were only allowable to the extent of $22,500.00. Pet. App. to Cert. Pet. at A31 and A5. As a result of their false sworn cost claims, Willington received five years of Medicaid overpayments. Pet. App. to Cert. Pet. at A31-A32 and A5. Literally between the two field audit decisions detecting their false cost claims and resultant illegal receipt of Medicaid overpayments (Pet. App. to Cert. Pet. at A32-A33), Willington's owners filed *only* the assetless operating corporation in bankruptcy in an obvious attempt to evade any repayment of the fruits of their fraud.

As will be demonstrated, the bankruptcy doctrine of recoupment prevents such fraud where the state Medicaid law such as Connecticut's makes one transaction the filing and paying out of the cost claims and the subsequent audit and recoupment of such claims to the extent they are false.[4]

If the Petitioner were to prevail, the short term result would be a national disaster to the Medicaid Program as nursing home owners in large numbers would fill their annual reports with false claims, collect and pocket the resultant Medicaid overpayments, and, when caught by the auditors, file their operating corporations in bankruptcy to evade repayment (all the while holding all of the assets—including the ill-gotten gains—personally and keeping them out of the bankruptcy).

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[4] It is no answer to argue that, if the Petitioner prevails in his efforts, the creditors of Willington rather than Willington's owners would benefit. For, as the Tenth Circuit observed, bankruptcy courts apply recoupment as an equitable doctrine to avoid unjust enrichment of the debtor *or a windfall to his creditors. In Re B&L Oil Co.*, 782 F.2d 155, 159 (10th Cir. 1986).

Bad as that would be to taxpayers nationwide, the long term result would be even worse. For Connecticut and the *amici* states utilizing similar Medicaid payment systems would be forced to change their laws to require some form of pre-audit of provider cost claims before Medicaid rate computation and payment. The result of that would be to harm directly the intended beneficiaries of the Medicaid Program, the frail institutionalized elderly, by at least delaying and in some cases denying monies vitally needed for their daily care and very existence.

To put it bluntly, in examining the equitable bankruptcy doctrine of recoupment, we must balance on one hand the vital need for daily care of Title XIX Medicaid recipients and the valuable scarce taxpayer dollars set aside to provide it versus attempted Medicaid fraud by nursing home owners and bankruptcy trustees who attempt to misuse the Bankruptcy Code to prevent repayment of past Medicaid overpayments which never belonged to the nursing home debtors in the first place[5] and thereby attain windfalls for the creditors. In the opinion of the *amici*, in terms of public policy, the issue here is not even close.

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[5] It has been specifically held that Medicaid providers "have no vested property interest in retaining . . . [past Medicaid] overpayments." *St. Joseph Hospital v. Electronics Data Systems Corp.*, 573 F. Supp. 443, 447 (S.D. Tex. 1983).

The *St. Joseph* Court went on to observe that "the funds at issue do not even 'belong' to the providers under any circumstances. . . The public interest factor strongly militates against the hospital's position since the public has a very strong interest in promptly recovering a debt . . . that has been due for several years. (One must bear in mind that the monies at issue here represent tax dollars)." 573 F. Supp. at 448-449.

See also *In Re American Cent. Airlines, Inc.*, 60 B.R. 587, 592 (Bankr. N.D. Iowa 1986) (the "interest that bankruptcy estate acquire[s] in the post-petition . . . payments is subject to DOT's right to recoup.")

The doctrine of recoupment is and has been, by judicial decision, part of the federal bankruptcy law both before and after the new Code was enacted in 1978. *Lee v. Schweiker*, 739 F.2d 870, 875 (3rd Cir. 1984).[6] In contrast to "setoff":[7]

> "[r]ecoupment, on the other hand, allows the creditor to assert that certain mutual claims extinguish each other in bankruptcy, in spite of the fact that they could not be 'setoff' under 11 U.S.C. § 533. The justification for the recoupment doctrine is that where the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim against the creditor rather than a mutual obligation, and the application of the limitation on setoff in bankruptcy would be inequitable [citation omitted]." 739 F.2d at 875.[8]

The Third Circuit then specifically observed:

> "In bankruptcy, the recoupment doctrine has been applied primarily where the creditor's claim against the debtor and the debtor's claim against the credi-

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[6] See also *In Re B&L Oil Co.*, 782 F.2d 155, 157 (10th Cir. 1986); *In Re Nickerson & Nickerson, Inc.*, 62 B.R. 83, 87 (Bankr. D. Neb. 1986); *In Re American Cent. Airlines, Inc.*, 60 B.R. at 590.

Further, nowhere in the 1978 Code or anywhere else does Congress express any intent to change this judicially created doctrine of bankruptcy law. It therefore continues. See *Kelly v. Robinson*, 107 S.Ct. 353, 359-360 (1986).

[7] Limited by 11 U.S.C. §553 in that pre-petition claims against the debtor cannot be setoff against post-petition debts to the debtor. *Lee*, 739 F.2d at 875.

[8] Indeed, it has been specifically held that the doctrine of recoupment is *not* subject to the setoff provisions of 11 U.S.C. §533. *In Re Yonkers Hamilton Sanitarium, Inc.*, 22 B.R. 427, 432 (Bankr. S.D.N.Y. 1982), *aff'd* 34 B.R. 385 (S.D.N.Y. 1983); *In Re Alpco, Inc.*, 62 B.R. 184, 188 (Bankr. S.D. Ohio 1986).

tor arise out of the same contract. [citations omitted]. *In a number of cases involving the bankruptcy of health-care providers, the courts have allowed . . . [Medicare fiscal intermediaries] to 'recoup' overpayments from amounts owed to the debtor post-petition, under a contract providing for such recoupment* [citing *In Re Monsour Medical Center*, 8 B.R. 606 (Bankr. W.D. Pa. 1981), *aff'd* 11 B.R. 1014 (W.D. Pa. 1981); *Yonkers, supra*; *In Re Berger*, 16 B.R. 236 (Bankr. S.D. Fla. 1981)] . . . The analysis used in these cases is based upon the treatment of executory contracts in bankruptcy: *a debtor may not assume the favorable aspects of a contract (post-petition benefits) and reject the unfavorable aspects of the same contract (the obligation to repay pre-petition overpayments by means of 'recoupment').*

The courts have generally taken a different approach in dealing with government benefits to individuals, such as social security. In these circumstances, the courts have held that a social-welfare statute entitling an individual to benefits is not a contract, and that the obligation to repay a previous overpayment is a separate debt subject to the ordinary rules of bankruptcy [citations omitted]. *We find the distinction persuasive.*" 739 F.2d at 875-876 (emphasis added).

The Tenth Circuit has joined the Third Circuit in recognizing the applicability of the recoupment doctrine

> "to allow the government to recover Medicare overpayments from post-bankruptcy reimbursements to a hospital that continued to operate after filing a Chapter 11 petition. [citation omitted]." *In Re B&L Oil Co.*, 782 F.2d 155, 157 (10th Cir. 1986).

Indeed, it has been held that where the doctrine of recoupment applies, "[t]here is no element of preference here or of an independent claim to be offset, but merely an arrival of a just and proper liability on the main issue, and this would seem permissible without any reference

to . . . § 553(a)." *In Re McCoy*, 65 B.R. 673, 674 (Bankr. S.D. Ill. 1986), *citing* 4 *Collier on Bankruptcy*, ¶533.03 at 553.12 (15th ed. 1981); *Yonkers, supra.*

See also *In Re American Cent. Airlines*, 60 B.R. at 590 (where the doctrine of recoupment governs, "the distinction between pre-petition and post-petition events does not apply"); *In Re Neuman*, 55 B.R. 702, 706 (Bankr. S.D. N.Y. 1985) (with an excellent discussion of the government's common law right to recoup Medicare overpayments from funds otherwise due to a health care provider codified both by statute and by regulations); *In Re Alpco, Inc.*, 62 B.R. at 187-188; *In Re Clowards*, 42 B.R. 627, 628 (Bankr. D. Idaho 1984).

The *Willington* case is a typical sham Chapter 11 filing by a nursing home attempting to evade recoupment of past Medicaid overpayments to which it was never entitled in the first place, while fully intending to continue in business as a Medicaid provider.[9]

Clearly, the conduct of Willington in continuing as a Medicaid provider and accepting all the financial benefits thereof well after filing in Chapter 11 and never indicating any desire to leave the Medicaid Program or reject the provider agreement constituted acceptance of said executory contract. *In Re Yonkers Hamilton Sanitarium, Inc.*, 22 B.R. at 435 (Medicare entitled to recoup past overpayments where provider took no action to assume or reject provider agreement but continued to receive benefits under such contract); *In Re Provident Medical Center and Provident*

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[9] Willington filed in Chapter 11 on June 2, 1982. Pet. App. to Cert. Pet. at A33. It was only after unrelated labor problems in March, 1983, that Willington closed in April, 1983, and had its case converted to Chapter 7 on July 27, 1983. Pet. App. to Cert. Pet. at A33-A34.

Hospital, ¶36,717, C.C.H. MEDICARE & MEDICAID GUIDE (Bankr. N.D. Ill. E.D. 1987) (Medicare entitled to recoup pre-petition overpayments to provider in bankruptcy from post-petition payment checks without prior leave of the court); *In Re B&L Oil Co., supra* (10th Circuit permitted recoupment where no court approval of executory contract assumption but where debtor elected to accept benefits of such executory contract); *In Re Reda, Inc.*, 54 B.R. 571, 880, 881 (Bankr. N.D.Ill. 1985) (although no formal assumption by debtor, debtor's actions constituted acceptance of executory contract, rendering debtor responsible for burdens of contract as well); *In Re Midwest Service and Supply Co., Inc.*, 44 B.R. 262, 265 (Bankr. D. Utah C.D. 1983) (debtor and creditor need not have sought bankruptcy court approval, for as long as debtor continues to accept benefits under a contract, it must also bear the burdens); *In Re Advanced Professional Home Health Care, Inc.*, No. 88-72436 (E.D. Mich. S.D.) (December 16, 1988) (Medicare entitled to recoup pre-petition overpayments to provider in bankruptcy from post-petition payment checks. "What must be remembered is that the relationship between the Secretary and a provider is no ordinary business relationship. A provider is the Secretary's surrogate in implementing an important governmental social welfare program and to treat the Secretary as an ordinary creditor and the provider as an ordinary debtor substantially distorts that relationship.").[10]

[10] Although petitioner is not appealing the recoupment independent ground for affirmance in this Court, in the courts below petitioner took the stance that because the nursing home debtor had never moved the bankruptcy court to either accept or reject the provider agreement-executory contract, the case of *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed. 2d 482

(Footnote continued on following page)

The "definition of debt must be read in the context of . . . [the legislative] policy" that "the bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension." *In Re Pellegrino*, 42 B.R. 129, 134 (Bankr. D. Conn. 1984).

Thus, the *amici* call to the attention of the Court that compelling public policy reasons exist to affirm the *Willington* judgment on the recoupment independent ground for affirmance, which petitioner has not appealed. For the Medicaid Program administered by the *amici* states should not be fiscally disrupted and the intended beneficiaries of said Medicaid Program, the frail institutionalized elderly, should not have valuable, scarce taxpayer dollars set aside to provide for their daily care diverted merely to enrich nursing home owners attempting Medicaid fraud and/or bankruptcy trustees attempting to misuse their power so as to obtain windfalls to creditors of nursing home debtors in the form of past Medicaid overpayments which the nursing home debtors were never entitled to in the first place.

[10] *continued*

(1984) rendered it exempt from the bankruptcy law doctrine of recoupment.

This position was and is clearly wrong for in *Bildisco*: 1) there was no recoupment issue at all; 2) while the *Bildisco* debtor gave notice by its conduct of its unwillingness or inability to comply with the collective bargaining agreement and then actually moved and obtained the permission of the bankruptcy court to reject that agreement (104 S.Ct. at 1192), the *Willington* debtor did none of this and by its conduct assumed the provider agreement; and 3) even *Bildisco* requires that pending formal assumption or rejection of a contract, the debtor is required to pay for the reasonable value of contractual services rendered to it (104 S.Ct. at 1199), and in *Willington* it is undisputed that "reasonable value" of Medicaid services rendered is only the provider's cost claims *after* verification by field audit.

As Justice Douglas observed and Justice Powell quoted with approval: "[w]e do not read these statutory words with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Kelly v. Robinson*, ___ U.S. ___, 107 S.Ct. at 361 [quoting *Bank of Marin v. England*, 385 U.S. 99, 103, 87 S.Ct. 274, 277, 17 L.Ed.2d 197 (1966)]. Aiding and abetting attempted Medicaid fraud by nursing home owners so as to deprive the frail institutionalized elderly of the monies set aside for their daily care is just not equitable.

CONCLUSION

For the reasons stated in this brief and in the brief of petitioners, *amici* respectfully urge this Court to affirm the decision of the court below.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROBERT J. RUIZ
Solicitor General, State of Illinois

JAMES C. O'CONNELL *
BARBARA L. GREENSPAN
Special Assistant Attorneys General
One North LaSalle Street, Suite 1900
Chicago, Illinois 60602
(312) 793-2380

Attorneys for Amicus Curiae,
State of Illinois

* Counsel of Record

(Additional Attorneys General listed on following page)

Additional Attorneys General

WARREN PRICE, III
Attorney General
State of Hawaii
State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

LINLEY E. PEARSON
Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
Louisiana Department of Justice
234 Loyola Avenue, 7th Floor
New Orleans, Louisiana 70112
(504) 568-5575

FRANK J. KELLEY
Attorney General
State of Michigan
752 Law Building
Lansing, Michigan 48933
(517) 373-1124

ROBERT M. SPIRE
Attorney General
State of Nebraska
State Capitol, Room 2115
Lincoln, Nebraska 68509
(402) 471-2682

JOHN P. ARNOLD
Attorney General
State of New Hampshire
State House Annex
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

LACY H. THORNBURG
Attorney General
State of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-3377

NICHOLAS J. SPAETH
Attorney General
State of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

T. TRAVIS MEDLOCK
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

CHARLES W. BURSON
Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6474

JAMES MATTOX
Attorney General
State of Texas
P.O. Box 12548
Capital Station
Austin, Texas 78711
(512) 463-2120

R. PAUL VANDAM
Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

JEFFREY L. AMESTOY
Attorney General
State of Vermont
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

MARY SUE TERRY
Attorney General
Commonwealth of Virginia
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4072

CHARLES G. BROWN
Attorney General
State of West Virginia
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 348-2021

DONALD J. HANAWAY
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, Wisconsin 53707
(608) 266-8549